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No. 944 7-14

IN THE

United States Circuit Court of Appeals

FOR THE THIRD CIRCUIT.

NO. 3512.

DANIEL J. SHIELDS, Defendant Below,
Plaintiff-in-Error,

v.

THE UNITED STATES.

RECORD.

Error to the Judgment and Sentence of the District Court of the United States for the Western District of Pennsylvania at No. 668 Criminal.

Received and Filed Oct. 5, 1926.
Saunders Lewis, Jr.,
Clerk.

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RECORD.

Among the Rolls, records and judicial proceedings had in the District Court of the United States for the Western District of Pennsylvania, at No. 668 Criminal, may be found the following words and figures:

IN THE
DISTRICT COURT OF THE UNITED STATES.

THE UNITED STATES
vs.
ERNEST G. EMMERLING, DANIEL J. SHIELDS, JOHN G. EMMERLING, CHARLES LYNCH, FRED WURSTER, LOUIS ABRAMSON, HERMAN WIDMAN, VICTOR J. SCHULLER, JULIUS ROTHSTEIN, RUSSELL SPANGLER, WILLIAM HOLTZMAN, MILAN DICKLICK, E. W. HARDISON, J. E. HUNTER, J. L. SIMLER, J. F. FREY, J. M. GASTMAN, C. L. SMITH, and ——— SNYDER, (whose true first names are to the grand jurors unknown).

Docket No. 668
Criminal.

ATTORNEYS:

For United States:
WALTER LYON.

For Defendant:
PERCY ALLEN ROSE.
CHARLES D. COPELAND.

Indictment: Count 1: Conspiracy; Count 2: Manufacture liquor; Count 3: Possess liquor; Count 3: Possession of property and material to manufacture liquor; Count 4: Maintaining nuisance.

Docket Entries.

1925.

May 7—A true bill.

May 7—Indictment filed.

June 8—Motion and order for bench warrant filed and entered.

June 8—Bench warrants (4) and (19) copies issued.

June 3—Defendant Milan Dicklick pleads *Nolo Contendere.*

June 11—Sentence of the Court is that "you, Milan Dicklick, be imprisoned in the Somerset County Jail at Somerset, Pa. for the term of one year, to run concurrently with sentence imposed at #489 Criminal.

June 11—Final commitment and copy issued.

June 11—Bond of Louis Abramson for Nov. Term 1925 taken and filed.

June 11—Bond of Victor J. Schuller for Nov. Term 1925 taken and filed.

June 11—Bond of Julius Rothstein for Nov. Term 1925 taken and filed.

June 11—Bond of Russell Spangler for Nov. Term 1925 taken and filed.

June 11—Bond of William Holtzman for Nov. Term 1925 taken and filed.

June 11—Bond of John F. Frey for Nov. Term 1925 taken and filed.

June 15—Bond of E. W. Hardison for Nov. Term 1925 taken and filed.

June 15—Bond of J. E. Hunter for Nov. Term 1925 taken and filed.

June 15—Bond of J. M. Gastman for Nov. Term 1925 taken and filed.

June 15—Bond of J. L. Simler for Nov. Term 1925 taken and filed.

June 15—Bond of Daniel J. Shields for Nov. Term 1925 taken and filed.

June 15—Bond of Herman J. Widman for Nov. Term 1925 taken and filed.

June 16—Bond of Charles L. Smith for Nov. Term 1925 taken and filed.

June 16—Bond of Charles G. Lynch for Nov. Term 1925 taken and filed.

June 16—Bond of E. C. Emmerling for Nov. Term 1925 taken and filed.

June 16—Bond of J. G. Emmerling for Nov. Term 1925 taken and filed.

June 18—Final commitment (Milan Dicklick) returned and filed.

July 11—Bench warrant returned and filed N. E. I. as to ——— Snyder.

July 13—Bench warrant (3) returned and filed.

Nov. 17—Petition and order for writ of *Habeas Corpus ad testificandum* filed and entered.

Nov. 17—Writ of *Habeas Corpus ad testificandum* and copy issued.

Nov. 18—Petition and order for subpoena *duces tecum* filed and entered.

Nov. 18—Subpoena *duces tecum* and copy issued.

Nov. 19—Petition and order for subpoena *duces*

tecum filed and entered. Subpoenas *duces tecum* (2) and (2) copies issued.

Nov. 20—Petition and order for subpoena *duces tecum* filed and entered. Subpoena *duces tecum* and copy issued.

Dec. 10—Bond of Fred Wurster for Nov. Term 1925 taken and filed.

Dec. 16—Order filed and entered releasing defendant, Milan Dicklick, on parole for a period of two years in charge of Thos. Cavanaugh, Prohibition Officer, to whom he shall report every two weeks.

Dec. 16—(2) Certified copies parole order issued. 1926.

Jan. 30—Petition of Herman Widman, C. W. Hardison, J. E. Hunter, J. L. Simler, Daniel J. Shields and J. M. Gastman for continuance and order denying said petition filed and entered. Exception noted.

Feb. 4—Praecipe for appearance of Percy Allen Rose and Charles D. Copeland, Jr. for Herman Widman, C. W. Hardison, J. E. Hunter, J. M. Simler, Daniel J. Shields and J. M. Gastman filed.

Feb. 5—Petition and order for subpoenas *duces tecum* filed and entered.

Feb. 5—Subpoenas *duces tecum* (5) and (5) copies issued.

Feb. 8—Defendant Ernest G. Emmerling pleads guilty to 2nd, 3rd and 4th counts.

Feb. 8—Defendants Fred Wurster and Victor Schuller plead guilty.

Feb. 8—Defendants J. C. Frey and Russell S. Spangler plead guilty to 2nd and 3rd counts.

Feb. 8—Defendants Daniel J. Shields, J. L. Simler, E. W. Hardison, J. E. Hunter, J. M. Gastman,

C. L. Smith, Herman Widman, Julius Rothstein, Charles Lynch, William Holtzman and John G. Emmerling plead not guilty.

Feb. 8—Jury called and sworn, ent.

Feb. 8—Trial continues.

Feb. 9—Trial continues.

Feb. 10—Trial continues.

Feb. 11—Trial continues.

Feb. 11—Petition and order for subpoena *duces tecum* to Cashier Union National Bank, Johnstown, Pa. returnable forthwith.

Feb. 12—Trial continues.

Feb. 13—Trial closes.

Feb. 13—Trial memorandum filed.

Feb. 13—Points for binding instructions to jury filed.

Feb. 13—Jury returns verdict of not guilty as to John G. Emmerling, Charles Lynch; E. W. Hardison, J. L. Simler and J. E. Hunter guilty on all 4 counts; Daniel J. Shields, Harry Widman, and J. M. Gastman guilty on first count and recommended to mercy of Court—not guilty on 2nd, 3rd and 4th counts.

Feb. 16—Motion for new trial and arrest of judgment ordered to be filed.

Feb. 25—Sentence of the Court is that Fred Wurster be imprisoned in the Cambria County Jail for 3 months.

Feb. 25—Temporary commitment issued (Wurster).

Feb. 25—Final committment issued (Wurster).

Feb. 25—Temporary and final committments returned and filed (Wurster).

Apr. 12—Sentence of the Court is that Ernest

Emmerling be imprisoned in the Somerset County Jail for a term of 3 months.

Apr. 12—Final commitment and copy issued.

Apr. 14—Final commitment returned and filed.

April 22—Sentence of the Court is that Victor J. Schuller pay a fine to the United States of $2000.00 and be imprisoned in the Somerset County Jail for the term of 1 year.

April 22—Sentence of the Court is that Russell Spangler be imprisoned in the Somerset County Jail for the term of two months.

April 22—Sentence of the Court is that J. C. Frey be imprisoned in the Somerset County Jail for the term of two months.

April 22—Final commitments (3) and (3) copies issued.

April 30—Final commitments (3) returned and filed.

April 22—Motion for new trial argued C. A. V.

May 3—Petition of Daniel J. Shields and order thereon refusing to grant said defendant an exception to additional instructions to the jury, filed and entered.

April 22—Additional reasons for new trial, etc on behalf of Daniel J. Shields filed.

April 29—Additional reasons for new trial, etc. on behalf of Herman Widman and J. M. Gastman filed.

April 29—Additional reasons for new trial etc. on behalf of Herman Widman *et al.* filed.

April 29—Additional reasons for new trial, etc. on behalf of J. L. Simler filed.

April 29—Additional reasons for new trial, etc. on behalf of Herman Widman filed.

April 30—Motion for new trial and in arrest of judgment of Daniel J. Shields (additional reasons) filed.

April 30—Exception of Daniel J. Shields to instructions to jury after deliberation, etc. filed.

May 11—Order entered on argument list: "Now, May 11, 1926, upon due consideration of defendant's motion for a new trial as well as the additional reasons therefor filed since the filing of the original motion and after a careful review of the whole case, we are convinced that the motion is without merit and therefor deny it.

PER CURIAM S."

May 14—Exception to order of Court overruling motion for new trial, etc. filed and entered.

June 2—Sentence of the Court is that E. W. Hardison, J. L. Simler, J. M. Gastman, Herman Widman and J. E. Hunter, each be imprisoned in the Cambria County Jail for 6 months; sentence to run from this date and imposed on the 1st count of the indictment, only.

June 2—Petition of J. L. Simler for writ of error and order allowing same filed; assignment of error filed.

June 2—Petition of Herman Widman for writ of error and order allowing same filed; assignments of error filed.

June 2—Petition of J. E. Hunter for writ of error and order allowing same filed; assignments of error filed.

June 2—Petition of C. W. Hardison for writ of

error and order allowing same filed; assignments of error filed.

June 2—Petition of J. M. Gastman for writ of error and order allowing same filed; assignments of error filed.

June 2—Bond of J. L. Simler sur writ of error approved and filed.

June 2—Bond of Harry Widman sur writ of error approved and filed.

June 2—Bond of J. E. Hunter sur writ of error approved and filed.

June 2—Bond of J. M. Gastman sur writ of error approved and filed.

June 2—Bond of E. W. Hardison sur writ of error approved and filed.

June 11—Citation awarded and issued.

June 11—Return of error issued and copy lodged in Clerk's Office.

June 11—Application of Daniel J. Shields for rehearing on motion for new trial and in arrest of judgment and order refusing same filed and entered.

June 12—Sentence of the Court is that defendant, Daniel J. Shields, pay a fine to the United States of $2000.00 and be imprisoned in the Cambria County Jail for the term of one year.

June 12—Petition of Daniel J. Shields for writ of error and order allowing same filed and entered; assignments of error filed.

June 12—Bond of Daniel J. Shields, sur writ of error approved and filed.

June 12—Citation awarded and issued.

June 12—Writ of error issued and copy lodged in Clerk's Office.

June 16—Citations (2) returned, service accepted by Joseph A. Richardson, Assistant United States Attorney.

June 15—Petition of Ernest G. Emmerling for parole filed and order denying said petition entered (11 Citizens' Petitions filed).

June 16—Service of citation sur appeal of Daniel J. Shields, accepted for defendant in error, by Joseph A. Richardson, Assistant United States Attorney.

June 16—Service of citation sur appeals of J. L. Simler, Harry Widman, J. E. Hunter, J. M. Gastman and E. W. Hardison accepted for defendant in error, by Joseph A. Richardson, Assistant United States Attorney.

July 8—Order of Court extending return day of citation sur appeal of Daniel J. Shields for 15 days filed and entered.

July 19—Praecipe re contents of record on appeal (Daniel J. Shields).

1926.

July 27—Order extending time to file record on appeal (Daniel J. Shields).

August 4—Bill of Exceptions filed.

August 10—Order made extending time for filing record in United States Circuit Court of Appeals to August 25, 1926.

Order made extending return day of citation to forty days from July 11, 1926, on appeals of J. L. Simler, C. W. Hardison, J. M. Gastman, J. E. Hunter and Herman Widman.

August 24—Order made extending time for filing record on appeal to September 15, 1926.

Indictment.

Filed May 7, 1925.

Western District of Pennsylvania, ss:

The Grand Jurors of the United States of America, now inquiring in and for the Western District of Pennsylvania, after being duly impaneled, sworn and affirmed and charged at the term of said Court now pending, upon their oaths and solemn affirmations, respectively do present, that

Ernest G. Emmerling,
Daniel J. Shields,
John G. Emmerling,
Charles Lynch,
Fred Wurster,
Louis Abramson,
Herman Widman,
Victor J. Schuller,
Julius Rothstein,
Russell Spangler,
William Holtzmann,
Milan Dicklich,
E. W. Hardison,
J. E. Hunter,
J. L. Simler,
J. C. Frey,
J. M. Gastman,
C. L. Smith, and
——— Snyder,
(Whose true first names are to the Grand Jurors unknown),

late of said district, heretofore, to wit, between the first day of October, in the year of our Lord one

thousand nine hundred and twenty-three, and the seventh day of April, in the year of our Lord, one thousand nine hundred and twenty-five, at Johnstown, in the County of Cambria, in the Western District of Pennsylvania, and within the jurisdiction of this Court, unlawfully, wilfully, knowingly, fraudulently and feloniously did combine, conspire, confederate and agree together and with each other, and with divers other persons to the Grand Jurors unknown, to commit certain offenses against the United States, to wit, to unlawfully and wilfully manufacture and possess intoxicating liquor containing more than one-half of one percentum of alcohol by volume, which was fit for use for beverage purposes, to wit, four hundred (400) gallons of whiskey and twenty-eight thousand (28,000) gallons of beer, in violation of the provisions of Section 3 of Title II of the Act of October 28, 1919, known as the National Prohibition Act.

OVERT ACTS.

And the Grand Jurors aforesaid, upon their oaths and affirmations aforesaid, do further present, that in pursuance of said unlawful and felonious conspiracy, combination, confederation and agreement, and to effect the object of the same, certain of said defendants hereinafter named did do, at the several times and places hereinafter mentioned in connection with their names, the several acts hereinafter specified:

1. Said Ernest G. Emmerling, Daniel J. Shields, John G. Emmerling, Charles Lynch, Fred Wurster, Louis Abramson, Herman Widman, Victor J. Schul-

ler, Julius Rothstein, Russell Spangler, William Holtzmann, Milan Dicklich, E. W. Hardison, J. E. Hunter, J. L. Simler, J. C. Frey, J. M. Gastman, C. L. Smith and ——— Snyder, (whose true first names are to the Grand Jurors unknown) on April 7th, 1925, at Johnstown, in the County of Cambria, in the Western District of Pennsylvania, and within the jurisdiction of this Court, did unlawfully and wilfully manufacture four hundred (400) gallons of whiskey and twenty-eight thousand (28,000) gallons of beer containing more than one-half of one percentum of alcohol by volume, which was fit for beverage purposes upon the premises of The Emmerling Products Company and the Conemaugh Products Company, being the property known as 101 Baumer Street, running from the said Baumer Street through to Horner Street, in the Seventh Ward of the City of Johnstown, County of Cambria, Pennsylvania.

2. The said Ernest G. Emmerling, Daniel J. Shields, John G. Emmerling, Charles Lynch, Fred Wurster, Louis Abramson, Herman Widman, Victor J. Schuller, Julius Rothstein, Russell Spangler, William Holtzman, Milan Dicklich, E. W. Hardison, J E. Hunter, J. L. Simler, J. C. Frey, J. M. Gastman, C. L. Smith and ——— Snyder, (whose true first names are to the Grand Jurors unknown) on April 7th, 1925, at Johnstown, in the County of Cambria, in the Western District of Pennsylvania, and within the jurisdiction of this Court, did unlawfully and wilfully have and possess four hundred (400) gallons of whiskey and twenty-eight thousand gallons (28,000) gallons of beer containing more than one-half of one percentum of alcohol by volume, which was fit

for use for beverage purposes, upon the premises of the Emmerling Products Company and the Conemaugh Products Company, being the property known as 101 Baumer Street, running from the said Baumer Street through to Horner Street, in the Seventh Ward of the City of Johnstown, County of Cambria, Pennsylvania;

3. Said Ernest G. Emmerling, Danied J. Shields, John G. Emmerling, Charles Lynch, Fred Wurster, Louis Abramson, Herman Widman, Victor J. Schuller, Julius Rothstein, Russell Spangler, William Holtzmann, Milan Dicklich, E. W. Hardison, J. E. Hunter, J. L. Simler, J. C. Frey, J. M. Gastman, C. L. Smith and ——— Snyder, (whose true first names are to the Grand Jurors unknown) on April 7th, 1925, at Johnstown, in the County of Cambria, in the Western District of Pennsylvania, and within the jurisdiction of this Court, did unlawfully and wilfully have and possess one hundred (100) gallons of rectified whiskey which was fit for beverage purposes, upon the premises of the Emmerling Products Company and the Conemaugh Products Company, being the property known as 101 Baumer Streeet running from the said Baumer Street through to Horner Street, in the Seventh Ward of the City of Johnstown, County of Cambria, Pennsylvania;

4. Said Ernest G. Emmerling, Daniel J. Shields, John G. Emmerling, Charles Lynch, Fred Wurster, Louis Abramson, Herman Widman, Victor J. Schuller, Julius Rothstein, Russell Spangler, William Holtzmann, Milan Dicklich, E. W. Hardison, J. E. Hunter, J. L. Simler, J. C. Frey, J. M. Gastman, C. L. Smith and ——— Snyder, (whose true first names

are to the Grand Jurors unknown) on April 7th, 1925, at Johnstown, in the County of Cambria, in the Western District of Pennsylvania, and within the jurisdiction of this Court, did unlawfully and wilfully have and possess material and property designed for the manufacture of intoxicating liquor, to wit, whiskey intended for use in violation of the provisions of Title II of the National Prohibition Act, towit, 1-500 Gallon Still, Coil and Condenser, 4 Galvanized Iron 50 Gallon Perculators, 1-350 Gallon Water Tank, 3 Steel Boiler, 50 Gallons capacity each, 5 Gallons and 1 pint of caramel coloring, upon the premises of the Emmerling Products Company and the Conemaugh Products Company, being the property known as 101 Baumer Street, running from said Baumer Street through Horner Street, in the Seventh Ward of the City of Johnstown, County of Cambria. Pennsylvania;

5. Said Ernest G. Emmerling, Daniel J. Shields, John G. Emmerling, Charles Lynch, Fred Wurster, Louis Abramson, Herman Widman, Victor J. Schuller, Julius Rothstein, Russel Spangler, William Holtzmann, Milan Dicklich, E. W. Hardison, J. E. Hunter, J. L. Simler, J. C. Frey, J. M. Gastman, C. L. Smith, and ——— Snyder, (whose true first names are to the Grand Jurors unknown) on April 7th, 1925, at Johnstown, in the County of Cambria, in the Western District of Pennsylvania, and within the jurisdiction of this Court, did unlawfully and wilfully have and possess material and property designed for the manufacture of intoxicating liquor to wit, beer intended for use in violation of the provisions of Title II of the National Prohibition Act, to wit, 1

Cyclone Filter Washer with Drum attached, 1-3 barrel rack-off machine, 1-100 barrel capacity copper beer kettle, 1 mash tank, 100 barrels capacity, 3 wooden casks, 13 steel tanks, 3 wooden casks, 11 wooden tanks, 1 malt grinder, 1 hop grinder, 18 bags of malt, 1 Standard scale, 1 large water cooler, 1 bottle washing machine, 1 pasturizer machine, 1 capping machine, I labeling machine, 1 automatic filler, 1 small hand capper, 1 large capper, 1 bottle filling machine, and one bottle drainer, upon the premises of the Emmerling Products Company and the Conemaugh Products Company, being the property known as 101 Baumer Street, running from said Baumer Street through Horner Street, in the Seventh Ward of the City of Johnstown, County of Cambria, Pennsylvania;

6. Said Ernest G. Emmerling, John G. Emmerling, Charles Lynch, Victor J. Schuller, Russell Spangler, Fred Wurster and J. C. Frey, on April 7th, 1925, at Johnstown, in the County of Cambria, in the Western District of Pennsylvania, and within the jurisdiction of this Court, were upon the premises known as the premises of the Emmerling Products Company and the Conemaugh Products Company, being the property known as 101 Baumer Streeet, running from said Baumer Street through to Horner Street, in the Seventh Ward of the City of Johnstown, County of Cambria, Pennsylvania, where there was a large quantity of beer and moonshine whiskey, to wit, twenty-eight thousand gallons (28,000) of beer and four hundred (400) gallons of moonshine whiskey;

7. Said Ernest G. Emmerling, John G. Emmerling, Charles Lynch, Victor J. Schuller, Russell Spangler, Fred Wurster, and J. C. Frey, on April 7th, 1925, at Johnstown, in the County of Cambria, in the Western District of Pennsylvania, and within the jurisdiction of this Court, did rack off one hundred (100) full barrels of beer containing more than four percentum of alcohol by volume;

8. Fred Wurster, on April 7th, 1925, at Johnstown, in the County of Cambria, in the Western District of Pennsylvania, and within the jurisdiction of this Court, acted as Brewmaster upon the premises of the said Emmerling Products Company and the said Conemaugh Products Company, known as 101 Baumer Street, running from said Baumer Street through Horner Street, in the Seventh Ward of the City of Johnstown, Pennsylvania;

9. Fred Wurster, on April 7th, 1925, at Johnstown, in the County of Cambria, in the Western District of Pennsylvania, and within the jurisdiction of this Court, acting as such Brewmaster, as aforesaid, did supervise the brewing of beer containing more than one-half of one percentum of alcohol by volume, fit for beverage purposes, upon the premises of the Emmerling Products Company and the Conemaugh Products Company, known as 101 Baumer Street, running from said Baumer Street through Horner Street, in the Seventh Ward of the City of Johnstown, Cambria County, Pennsylvania;

10. That Ernest G. Emmerling, John G. Emmerling, Victor J. Schuller and J. C. Frey on April 7th, 1925, at Johnstown, in the County of Cambria, in the Western District of Pennsylvania, and within

the jurisdiction of this Court, did supervise the manufacture of intoxicating liquor containing more than one-half of one percentum of alcohol by volume, fit for use for beverage purposes, towit, moonshine whiskey and beer, upon the premises of the Emmerling Products Company and the Conemaugh Products Company, known as 101 Baumer Street, running from said Baumer Street through Horner Street, in the Seventh Ward of the City of Johnstown, Pennsylvania;

11. That Louis Abramson and Milan Dicklich, on or about October 1st, 1923, at Johnstown, in the County of Cambria, in the Western District of Pennsylvania, and within the jurisdiction of this Court, did execute a contract or leasehold for the said premises known as 101 Baumer Street, in the Seventh Ward of the City of Johnstown, Cambria County, Pennsylvania, and did purchase property and equipment upon the said premises known as 101 Baumer Street, in the Seventh Ward of the City of Johnstown, County of Cambria, Pennsylvania, to wit, 1 lot of kegs, 1 lot of cases, 1 lot of bottles, 1 lot of grain, and 1 lot of malt and hops, and all other person property in or about the premises belonging to the Emmerling Products Company;

12. That Daniel J. Shields, J. M. Gastman, J. L. Simler, and Herman Widman, on or about February 26th, 1924, at Johnstown, in the County of Cambria, in the Western District of Pennsylvania, and within the jurisdiction of this Court, did apply to the Federal Prohibition Director for the State of Pennsylvania, for a permit to operate a dealcoholizing plant for the manufacture of malt liquor;

13. That Daniel J. Shields, J. M. Gastman, J. L. Simler and Herman Widman, on or about February 15th, 1924, at Johnstown, in the County of Cambria, in the Western District of Pennsylvania, and within the jurisdiction of this Court, did apply to the Aetna Casualty and Security company of Johnstown, Pennsylvania, for a bond to accompany the application to the Federal Prohibition Director for the State of Pennsylvania, for a permit to operate a dealcoholizing plant;

14. That Daniel J. Shields, J. M. Gastman, J. L. Simler and Herman Widman, on or about February 15th, 1924, at Johnstown, in the County of Cambria, in the Western District of Pennsylvania, and within the jurisdiction of this Court did apply to the Aetna Casualty and Security Company at Johnstown, Pennsylvania, for a bond to secure one year's payment of rental for the use of the real estate and equipment known as 101 Baumer Street, in the Seventh Ward of the City of Johnstown, Cambria County, Pennsylvania, known as the Emmerling Products Company and the Conemaugh Products Company;

15. That during the month of February, 1924, E. W. Hardison, at Johnstown, in the County of Cambria, in the Western District of Pennsylvania, and within the jurisdiction of this Court, signed a contract for electric power from the Johnstown Public Service Corporation for the said premises known as 101 Baumer Street, in the Seventh Ward of the City of Johnstown, Cambria County, Pennsylvania, the said E. W. Hardison signing said contract as president of the Conemaugh Products Company;

6. That J. E. Hunter, on or about February 1924, at Johnstown, in the County of Cambria, e Western District of Pennsylvania, and within risdiction of this Court did enter into a contract old with the United States Trust Company, Re- for the Emmerling Products Company, for part e premises known as 101 Baumer Street, in the of Johnstown, County of Cambria, Pennsylvania, rewery plant and certain equipment thereon, in- ng the boiler room, engine room, refrigerating , machinery, water works, storage tanks, to- r with racking machinery, wash house machin- cooper, pitch machinery and beer bottling equip- ; and so the Grand Jurors aforesaid, upon their aforesaid, do say that said defendants, continu- throughout the period of time, at the place, he manner and form aforesaid, unlawfully and iously did conspire to commit offenses against nited States and certain of said defendants did ts to effect the object of said conspiracy; against eace and dignity of the United States of Ameri- nd contrary to the form of the statute in such made and provided.

OND COUNT.

And the Grand Jurors aforesaid, upon their oaths affirmations aforesaid, do further present, that

Ernest G. Emmerling,
Daniel J. Shields,
John G. Emmerling,
Charles Lynch,
Fred Wurster,
Louis Abramson,

Herman Widman,
Victor J. Schuller,
Julius Rothstein,
Russell Spangler,
William Holtzmann,
Milan Dicklich,
E. W. Hardison,
J. E. Hunter,
J. L. Simler,
J. C. Frey,
J. M. Gastman,
C. L. Smith, and
——— Snyder,
(whose true first names are to the Grand Jurors unknown)

late of said district, heretofore, to wit, on the seventh day of April, in the year of our Lord, one thousand nine hundred and twenty-five, at Johnstown, in the County of Cambria, in the Western District of Pennsylvania, and within the jurisdiction of this Court, did wilfully and unlawfully manufacture intoxicating liquor containing more than one-half of one per centum of alcohol by volume, which was fit for use for beverage purposes, to wit, four hundred (400) gallons of whiskey and twenty-eight thousand (28,000) gallons of beer, in violation of the provision of Section 3 of Title II of the National Prohibition Act; contrary to the form of the Act of Congress in such case made and provided, and against the peace and dignity of the United States of America.

THIRD COUNT.

And the Grand Jurors aforesaid, upon their oaths and affirmations aforesaid, do further present that

Ernest G. Emmerling,
Daniel J. Shields,
John G. Emmerling,
Charles Lynch,
Fred Wurster,
Louis Abramson,
Herman Widman,
Victor J. Schuller,
Julius Rothstein,
Russell Spangler,
William Holtzmann,
Milan Dicklich,
E. W. Hardison,
J. E. Hunter,
J. L. Simler,
J. C. Frey,
J. M. Gastman,
C. L. Smith and
——— Snyder,
(whose true first names are to the Grand Jurors unknown)

late of said district, heretofore, to wit, on the seventh day of April, in the year of our Lord, one thousand nine hundred and twenty-five, at Johnstown, in the County of Cambria, in the Western District of Pennsylvania, and within the jurisdiction of this Count, did wilfully and unlawfully have and possess intoxicating liquor containing more than one-half on one percentum of alcohol by volume, which was fit for

beverage purposes, to wit, four hundred (400) gallons of whiskey and twenty-eight thousand (28,000) gallons of beer, in violation of the provisions of Section 3 of Title II of the National Prohibition Act; contrary to the form of the Act of Congress in such case made and provided, and against the peace and diginity of the United States of America.

FOURTH COUNT.

And the Grand Jurors aforesaid, upon their oaths and affirmations aforesaid, do further present, that

Ernest G. Emmerling,
Daniel J. Shields,
John G. Emmerling,
Charles Lynch,
Fred Wurster,
Louis Abramson,
Herman Widman,
Victor J. Schuller,
Julius Rothstein,
Russell Spangler,
William Holtzmann,
Milan Dicklich,
E. W. Hardison,
J. E. Hunter,
J. L. Simler,
J. C. Frey,
J. M. Gastman,
C. L. Smith and
——— Snyder,
(whose true first names are to the Grand Jurors unknown)

late of said district, heretofore, to wit, on the seventh day of April, in the year of our Lord, one thousand nine hundred and twenty-five, at Johnstown, in the County of Allegheny, in the Western District of Pennsylvania, and within the jurisdiction of this Court, did wilfully and unlawfully have and possess material and property designed for the manufacture of intoxicating liquor intended for use in violation of the provisions of Title II of the National Prohibition Act, to wit, 1-500 gallon still, coil and condenser, 4 galvanized iron 50 gallon perculators, 1-350 gallon water tank, 3 steel boilers, 50 gallons capacity each, 5 gallons and 1 pint of caramel coloring, 1 Cyclone filter washer with drum attached, 1-3 barrel rack-off machine, 1-100 barrel capacity copper beer kettle, 1 mash tank, 100 barrels capacity, 3 wooden casks, 13 steel tanks, 11 wooden tanks, 1 malt grinder, 1 hop grinder, 18 bags of malt, 1 Standard scale, 1 large water cooler, 1 bottle washing machine, 1 pasturizer machine, 1 capping machine, 1 labeling machine, 1 automatic filler, 1 small hand capper, 1 large capper, 1 bottle filling machine, and one bottle drainer, in violation of the provisions of Section 25 of Title II of the National Prohibition Act; contrary to the form of the Act of Congress in such case made and provided, and against the peace and dignity of the United States of America.

FIFTH COUNT.

And the Grand Jurors aforesaid, upon their oaths and affirmations aforesaid, do further present, that

Ernest G. Emmerling,
Daniel J. Shields,
John G. Emmerling,
Charles Lynch,
Fred Wurster,
Louis Abramson,
Herman Widman,
Victor J. Schuller,
Julius Rothstein,
Russell Spangler,
William Holtzmann,
Milan Dicklich,
E. W. Hardison,
J. E. Hunter,
J. L. Simler,
J. C. Frey,
J. M. Gastman,
C. L. Smith and
——— Snyder,
(whose true first names are to the Grand Jurors unknown)

late of said district, heretofore, to wit, on the seventh day of April, in the year of our Lord, one thousand nine hundred and twenty-five, at Johnstown, in the County of Cambria, in the Western District of Pennsylvania, and within the jurisdiction of this Court, unlawfully and knowingly did keep and maintain certain premises, to wit, premises at 101 Baumer Street, running from said Baumer Street through to Hor-

ner Street in the Seventh Ward of the City of Johnstown, in the County of Cambria, Pennsylvania, used and occupied by the above named defendants as premises wherein were kept by them certain intoxicating liquor containing more than one-half of one per centum of alcohol by volume, to wit, 400 gallons of whiskey and 28,000 gallons of beer, which said premises as aforesaid, so containing said intoxicating liquor as aforesaid, were a common nuisance, the maintenance of said premises as aforesaid being then and there prohibited and unlawful and in violation of the provisions of Section 21 of Title II of the National Prohibition Act; contrary to the form of the Act of Congress in such case made and provided, and against the peace and dignity of the United States of America.

WALTER LYON,
United States Attorney.

PLEA.

The defendant Daniel J. Shields waives arraignment and pleads not guilty in open court this 8th day of February, A. D., 1926.

DANIEL J. SHIELDS.

Note From Jury.

Filed April 22, 1926.

To the Honorable Court:
Sir:

We, the jury find the defendants, John G. Emmerling, Charles Lynch not guilty on all counts. E. W. Hardison, J. E. Hunter and J. L. Simler guilty on all counts. Daniel J. Shields, Harry Widman, J. M. Gastman unable to agree.

Signed,
E. B. MILLIGAN,
Foreman.

Feb. 13, 1926.

The jury will have to find also whether Shields, Widman and Gastman are guilty or not guilty.

F. P. SCHOONMAKER,
Judge.

Verdict.

We, the jury find the defendants John G. Emmerling, Charles Lynch, not guilty on all counts. E. W. Hardison, J. L. Simler, J. E. Hunter guilty on all four counts. Daniel J. Shields, Harry Widman, J. M. Gastman guilty on first count and recommended to mercy of court. Not guilty on 2nd, 3rd and 4th counts, this 13th day of February, 1926.

E. B. MILLIGAN,
Foreman.

Bill of Exceptions.

Filed Aug. 4, 1926.

Be it remembered, that on the trial of this cause in this Court at the November Term of the Said District Court for the year 1925, to wit, February 8th, 1926, before the Honorable F. P. Schoonmaker, one of the judges of the said Court, and a jury in the course of which trial certain proceedings were had as follows, to wit:

COUNSEL PRESENT:

JOSEPH A. RICHARDSON, Esq.,
Assistant U. S. District Attorney,
For the United States.

PERCY ALLEN ROSE, Esq.,
JOSEPH HOLTZMANN, Esq.,
CHARLES D. COPELAND, JR., Esq.,
For Defendants Daniel J. Shields, J. L. Simler, E. W. Hardison, J. E. Hunter, J. M. Gastman, Herman Widman.

W. HEBER DITHRICH, Esq.,
For Defendants Julius Rothstein and William Holtzmann.

EDGAR LEAHEY, Esq.,
For Defendants Charles L. Smith, Charles G. Lynch and J. G. Emmerling.

JULIUS RODSTEIN.

(Julius Rothstein, one of the defendants, called as a witness.)

Mr. Dithrich: If the Court please, the Government called this defendant as a witness in this case. He cannot refuse to testify, and he is perfectly willing, as I understand, to take the witness stand and lay bare all of the details of this conspiracy; and as he cannot be subjected to any penalty as to any transaction or matters to which he may testify, I desire to claim on his behalf immunity under the National Prohibition Act. I believe that is agreed to.

Mr. Richardson: The Government appreciates that the witness will gain immunity, if it is claimed at this time.

Mr. Rose: If your Honor please, on behalf of the defendants whom we represent, we object to the calling of this defendant, Julius Rothstein, as a witness for the Government. We object to any immunity being promised or accorded him. Being a defendant, he does not come within the purview of the Act of Congress. That relates merely to one who appears pursuant to a subpoena, and does not include a defendant, and on behalf of these defendants, we object to the Government calling this witness.

The Court: We overrule this objection on the part of the co-defendants of Julius Rothstein who are objecting to his testifying in this case. The right of a defendant to remain silent is a personal right, and he is not obliged to respond to the call of the Govern-

ment unless he chooses. Apparently he has chosen to be sworn and testify as a witness in behalf of the Government, and he may do so.

Exceptions noted to defendants Shields, Simler, Hardison, Hunter, Gastman and Widman.

WILLIAM HOLZMAN.

(William Holzman, defendant, called as a witness.)

Mr. Dithrich: If the Court please, I desire to make on behalf of this defendant, who is called as a witness for the Government, the same claim as was made on behalf of the defendant, Julius Rothstein.

Mr. Rose: We renew our objection, to the effect that this is a defendant, along with the six defendants whom we represent, among others, and that being a defendant, he does not appear pursuant to a subpoena, and therefore is not entitled to any immunity under the Act of Congress, and we object to his testifying against any one of these defendants.

The Court: This witness is not obliged to testify. He may testify if he desires. We overrule your objection.

Mr. Leahy: May I make the same objection as Mr. Rose has made?

The Court: The same ruling.

Exception noted to defendants Shields, Simler, Hardison, Hunter, Gastman, Widman, Smith, Lynch and Emmerling.

CHARGE OF THE COURT.

(SCHOONMAKER, J.)

Gentlemen of the Jury:

In the case in which you have just heard the evidence, the defendants were indicted and are on trial before you on an indictment charging them with several offenses against the laws of the United States. The indictment contains four counts or charges. The first count, or charge, charges a conspiracy to commit an offense against the laws of the United States. The second count charges the manufacture of intoxicating liquor, in violation of the National Prohibition Act. The third count charges the possession of intoxicating liquor, in violation of the National Prohibition Act. The third count charges the possession of property and material designed for the manufacture of intoxicating liquor, in violation of the National Prohibition Act. And the fourth count charges the maintenance of a common nuisance upon the premises of the brewery company mentioned, in violation of the National Prohibition Act. So that there are four distinct offenses charged here, and when you come to render your verdict you will find it as to each of the four counts, whether each of the individual defendants named is guilty or not guilty of the four separate counts or charges against him.

Now, the defendants involved in this trial are Daniel J. Shields, J. L. Simler, E. W. Hardison, J. E. Hunter, Herman Widman, J. M. Gastman, J. G. Emmerling, Charles G. Lynch and Charles L. Smith. Those defendants pleaded not guilty. Two other defendants pleaded not guilty, and those two defendants

were Julius Rothstein and William Holzman. Those two defendants, Julius Rothstein and William Holzman, were called to the witness stand by the Government. Under the provisions of the National Prohibition Act, they cannot refuse to testify when called by the Government, but the effect of calling them as witnesses in behalf of the Government brings to them immunity as to the matters charged against them. And therefore, so far as these two defendants, Julius Rothstein and William Holzman, are concerned, the case ended as to them when they were called to the witness stand as witnesses for the government. The case as to them, as we have said is at an end.

Gentlemen, the division of responsibility between the Court and the jury in this case is as follows: The law of this case is for the Court. It is our duty to instruct you as to the law, and it is your duty to accept the law as we lay it down to you. If we happen to make a mistake as to the law, that may be corrected by an appeal to the higher courts. The facts in the case are for the jury. You are the absolute and conclusive judges of the facts of this case. Anything that we may say to you during the course of this charge bearing upon the facts, or commenting upon the testimony of the witnessess, is not binding upon you or in any way conclusive upon you. Anything that counsel may have said in the course of their arguments to you as to the facts in the case is not binding upon you, because you are the sole and conclusive judges of the facts. The Court has the right and probably ought to comment upon the testimony and explain it to you somewhat, but you will understand that, so far as we do that, we are not

undertaking in any way to bind you, because, as we have said, you are not bound as to the facts of the case by anything that the Court or counsel say, because, as we have already repeated, you are the sole and conclusive judges of the facts of this case.

Now, as to the law of the case: The first count charges a conspiracy to commit an offense against the laws of the United States, that is, an offense fixed by Section 37 of the Criminal Code of the United States, which provides that "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of the parties do any act to effect the object of the conspiracy", the offense is made out. Now, that means just this: A conspiracy is a combination of two or more persons by some concerted action to accomplish some criminal or unlawful purpose, and it is not necessary to prove that the defendants actually agreed in terms upon a design to be pursued by common means, but where they pursue the same object, with a view to its attainment, the jury may conclude that they were engaged in a conspiracy to effect that end. That is to say, when a conspiracy charge appears in a case, it is not necessary to prove, for instance, that the defendants sat down together in a room and agreed that they were going to violate the law. But if you find from the evidence in the case, from the acts of the parties, that there did a conspiracy exist between two or more persons to violate the law, and one or more of those persons did some act, which is commonly termed an overt act, to effect that conspiracy, the offense is complete. Now, so far as the overt act

is concerned, it is not necessary that the act charged as an overt act itself be a criminal act. In this case, charging a conspiracy to violate the National Prohibition Act, there are some fifteen overt acts contained in the first count of the indictment, and it is not necessary, to bring in a conviction as to that count, that you find that every one of those overt acts has been accomplished. It is enough if you find that any one of the persons who were a part of this conspiracy did any one of those overt acts in furtherance of the conspiracy charged. Now, if you find that a conspiracy did exist between two or more persons, then the act of any one of those persons becomes the act of all and is binding upon all those who were involved in it. From the acts of the parties, from their association together, under the testimony in the case, you are to determine whether or not a conspiracy did exist, and whether or not any one of the overt acts charged in the indictment as having been performed was actually done by any one of the defendants who became parties to this conspiracy.

The second count charges the manufacture of the intoxicating liquor. It is contrary to the National Prohibition Act to manufacture intoxicating liquor, and that is the substance of the second count,—the manufacture of intoxicating liquor, in violation of the National Prohibition Act.

The substance of the third count is the possession of intoxicating liquor containing more than one-half of one per cent of alcohol by volume. As a matter of law, we say to you it is a violation of law to possess intoxicating liquor of that character, and that if you find from the evidence that the liquor was possessed,

such possession is *prima facie* evidence that it was possessed for the purpose of being bartered, sold and exchanged, in violation of the provisions of the Act.

The third count charges the possession of property and material designed for the manufacture of intoxicating liquor. This is in violation of the National Prohibition Act. Persons cannot lawfully possess property and material designed for the manufacture of intoxicating liquor.

Now, the fourth count is a nuisance count. Under that count, "Any room, house, building, boat, vehicle, structure, or place where intoxicating liquor is manufactured, sold, kept or bartered, in violation of this title, all property, liquor, kept and used in maintaining the same is hereby declared to be a common nuisance, and any person who maintains such nuisance shall be guilty", and so forth.

Whatever your views may be on the subject of national prohibition, whether you are in favor of it or whether you are against it, is of no moment in this particular case. We are here charged with the duty of trying certain defendants who are accused of the violation of the National Prohibition Act, and whether we are for it or whether we are against it has no bearing in this case. It would be improper for me to tell you what my views are on the subject of prohibition, or for you yourselves, when you go to your jury room, to even discuss your own personal views upon that subject. You should not be influenced either for or against the defendants in this case by your views on the subject of national prohibition.

Now, these defendants in this case, as in every other criminal case, come into court presumed to be

innocent, and that presumption rests with them until you, the jury, become satisfied by the proof beyond a reasonable doubt that they are guilty of the offense charged against them; and the burden rests upon the Government to so satisfy you. A reasonable doubt is a doubt growing reasonably out of the evidence, or out of lack of it. It is not a captious doubt, not a doubt engendered merely by sympathy for the unfortunate position of the defendant, or a dislike to accept the responsibility of convicting a fellow man. Proof beyond a reasonable doubt is not proof of a mathematical demonstration; it is not proof beyond the possibility of mistake it does not require that all possible doubt be excluded from the mind. The doubt must be a substantial one, arising from testimony or the lack of it. It must be a reasonable doubt such as would cause a reasonable and cautious man of average intelligence to hesitate in reaching a conclusion in a serious matter, upon which he is called to decide, affecting his own private affairs.

Now, the Government in the present case undertook and assumed the burden which the law cast upon it by calling certain witnesses to testify here before you, and the defendants have called certain other witnesses in their own behalf. The Government produced the testimony of Dowd, the prohibition agent, as to what occurred at this plant of the Conemaugh products Company when he and Agent Edwards went there on the 7th of April, 1925; he has described what he found there in the way of beer and whiskey, the beer vats and the quantity of beer, and the alcoholic content, and the persons he saw there upon the premises at that time. As we recall it, he said he saw

Wurster and Victor Schuller, and that Victor Schuller suggested to him, "Isn't there some way to fix this up?" or some words to that effect; that he saw John Emmerling there upon the premises, and he also saw Ernest Emmerling, as we recall it, and that Ernest Emmerling suggested to him to overlook certain stills, or something that he found in the neighborhood of the candy plant. He explained to you the general appearance of the brewery premises and the apparatus that he generally found there. Agent Edwards, who was with him, described what he did on that day, and the fact that Victor Schuller also requested him to fix the matter up in some way. He said that he saw Wurster also, and saw John Emmerling on the premises, and told of the alcoholic content of the liquor. Agent Booth, who made the test on the premises at that time, was here also and explained to you the samples that he took and the test that he made of the beer on the premises.

The Government then produced a witness by the name of Miller, who said that he was a fireman and that he worked on the premises from July of 1924 to April 7, 1925, and that he worked under John Fry, who seems to have been named as one of the defendants and who has entered a plea of guilty; that he had a key to the gate, and he let himself in and out of the gate; that he saw Wurster and Ernest Emmerling and Rothstein, and with them he said he saw some man who was pointed out to him as Shields, but he was unable to recognize Shields, and so far as that was concerned, that does not connect Shields up with the transaction.

Then Wurster, the brewmaster, was called, and he said that the defendant Simler took him from Windber, and that he started as brewmaster here in June, 1924, and that Rothstein and Schuller were on the premises, and that Hardison was there; that he took orders first from Simler; he saw Shields there, who said that "everything looks nice." He also testified that the beer was taken out at night; that he was paid by Hardison and Rothstein, and that Simler also paid him some time in either June, July or August.

Then the agent of the trust company, Mr. Bearer, was called and testified as to the lease to Hunter, and that he received rent from Rothstein and also from Mr. Holzman, if we remember correctly.

Then Wendel, the agent of the trust company, who ran the candy plant, was called, and said that Widman spoke to him about leasing the property, and that the rents were paid by checks signed by J. E. Hunter, and that he saw Simler there talking to Widman, and saw Wurster, the brewmaster, talking to Widman; that he talked with Ernest Emmerling about the rent for the Mars Club, but he never received any.

And then the Government called Schnabel, who was to have gone into the enterprise with Hardison and Hunter, but doesnt seem to have gone in.

Then they called the agent of the surety company, who produced, as we recall, the back bond signed by Daniel J. Shields, J. M. Gastman, J. L. Simler and Herman Widman. Then they called the truck driver, who was arrested about Christmas time, 1924, who told about going to Rothstein and then going with Rothstein and Holzman to see Mr. Shields, who

caused Mr. Rose to be retained to defend him. Witness Stiegelman was called, who said he hauled beer from the brewery, and that he saw Rothstein, Holzman, Schuller and Wurster on the premises, and worked there from December, 1924, to April 7, 1925.

The Government then called Mr. Palmer, one of the special agents of the Department of Internal Revenue, who told of his meeting Shields in Washington on or about the 11th of March, 1924, what occurred between them at that time, being introduced by Major Johnson, and the suggestion that was made there about expediting the inspection of the brewery; and he testified as to the further telephone conversations with him from several places, and as to the meeting between them at a hotel in Baltimore, at which time he exhibited a report from agents who had made an examination of the brewery, and a suggestion was there made that Shields pay him $500, which was subsequently mailed from Shields' office in Johnstown to Mr. Palmer, who represented himself to be Eddie Parker at this time, and the money was brought into court and shown to you and the transaction explained. The agents Glutsch, Lucas and Cox testified that they were present in the next room at the time of this occurrence at the Baltimore hotel, and told you what they saw of the transaction.

Then the Government put Mrs. Evans upon the witness stand, who testified to certain conversations that she had with the defendant Shields, and what he told about owning the brewery and how much he paid for it, of his offer to give her a part of the stock, and subsequent conversations with him wherein he promised her an automobile, and possibly bought a type-

writer for her. You heard her testimony in that respect.

Then the Government called the defendant Rothstein, who told about Daniel Shields selling the brewery, and what occurred at the meeting at the office in the Capital Building, when Schuller, Simler, Widman and Gastman were present, where it was agreed that there should be paid $50,000, and $25,000 was paid. And Rothstein testified further to the agreement after Shields insisted upon $13 a barrel for protection; he said that that conversation, as we recall it, occurred in a room adjoining the one in which the other parties were. And Holzman corroborates this same thing. Rothstein testified, as the result of that, he paid to Shields the sum of $80,521 as protection money.

Now, I am not going to undertake to review all of the testimony offered by the Government or by the defendants. That testimony is for you, and if we omit to mention or refer to any other, it is not because we do not regard it as important, but we are just calling your attention to some of the testimony. It is your duty to remember any other, and just because we do not mention it is not because it is not important. All of the testimony in the case is for you, and it is your duty to remember it, and your remembrance of it, and not the remembrance of the Court or the counsel, will be what will govern in the case.

Now, the defendant John Emmerling took the stand in his own behalf, and denied absolutely that he had any connection with this enterprise. He said that he from time to time went there to get his mail, because his name being Emmerling, some of his mail intended for his place of business down the street a

little ways sometimes got put into the brewery premises, where he used to get it; and that he had been using for a number of years the electric saw in the yard for sawing wood, and occasionally went there after this Products Company started operation, for the purpose of sawing wood.

Charles G. Lynch, one of the defendants, said he was merely there to wash pop bottles. You heard the testimony recited to you about where the agents found him, and what he said to them, and about his running into some part of the brewery when he saw Agent Dowd, I think it was, coming toward the premises. It is for you to say whether or not they were sufficienty connected with this enterprise. In their behalf we are asked to give binding instructions, as follows:

> "Under all the evidence in the case, the verdict of the jury as to the defendant John Emmerling should be not guilty."

We refuse this point, and say that, under the evidence, the case is for you to decide whether or not he was interested in the case.

As to Charles G. Lynch, one of the defendants, this point is presented:

> "Under all the evidence in the case, the verdict of the jury as to Charles G. Lynch, one of the defendants, should be not guilty."

We refuse this point, and say to you also that his connection with this case is for you to consider.

The defendant Smith we discharged at the conclusion of the Government's case, because no evidence seemed to connect him with this enterprise, and you have not the burden of considering the case as to him.

Then as to the other defendants, Roman Widman, the attorney, went upon the witness stand and told of negotiating the lease on the premises for Mr. Hunter, and how he got the charter for the Delaware corporation by the name of the Conemaugh Products Company and the later organization of it, and what was done with regard to the issuance of the stock, and who were elected officers, and so forth, in that general transaction.

Major Johnson was then called to the stand, and said that he had introduced the agent Palmer, whom they knew as Parker, to Mr. Shields, and stated also that he met Mr. Shields at the office of a patent attorney down in Washington, and did not meet him at the Prohibition Office. Major Johnson, as you will recall, testified that he at this time was an attorney for the Government.

Then Shields himself took the witness stand in his own behalf, and absolutely denied any connection with this enterprise other than as a friend of the parties engaged. He said he was interested in these people and was willing to help them along, he went on their bond for that purpose only, and that when he found that there was some delay about their application for a permit being acted upon, he undertook to expedite the matter, as the result of his conversation with Mr. Parker, who thought they could expedite it, and practically admitted securing the $500 which was paid to Mr. Parker. As we recall it, he testified that he instructed his stenographer over the telephone to get the currency and mail it to him, which was done; so there is no controversy over that. Now, it is for you to say whether that is the act of an innocent man or

the act of a guilty man. Would he have paid $500 if he were not interested in this enterprise? It is for you to say whether he would or whether he would not. What is his connection with the matter? As a man who is entirely innocent, would he pay $500 of his own money, if he were not vitally interested in the enterprise? That is for you to say, under the evidence. He has said that he knew Mrs. Evans, but he denied absolutely telling her that he owned this brewery, that he had paid $140,000 for it, or something of that kind; denied that he offered to give her any of the stock, denied that he offered to buy her an automobile of any kind, denied that he offered to give her a typewriter. He said he casually met her and was introduced to her by Dr. Barchfield, when he wanted to make a social call upon Colonel Nutt, that he had no business at the Prohibition Office himself, but he called there merely with Dr. Barchfield, because he wanted to make a friendly visit, and had no interest in a brewery matter. You will recall his further testimony upon that subject, and generally his whole testimony.

Herman Widman then took the stand and said he signed the back bond, and was interested in the matter by reason of Hardison being his brother-in-law; and after explaining to you several business enterprises, in which he had entered, and going quite thoroughly into it, you will recall it was not until he was on cross-examination that he said that he had any interest in the Windber Products Company.

Gastman, the defendant, took the witness stand in his own behalf and denied absolutely any interest in this transaction in any way, and he was not interested in the money loaned, that he was not interested in the plant at all, and that he had loaned Hunter

$1700; that these two men, I believe, said that they were interested in the real estate business, and negotiated or had something to do with the sale from Hunter to Rothstein, and they were there as real estate dealers in closing up that deal. As we recall it, they both denied that the $13 arrangement was made with Mr. Shields, and say that it was not made.

Milan Dicklich was called to the witness stand and told us of his connection with this enterprise, and he said that no $13 arrangement was made; that they agreed to buy the brewery for $50,000, that they met at this office, that $25,000 was paid in currency at that time, and, as we recall it, he said that Simler furnished the paper to wrap up the money, but that nothing was said by Shields about requiring a tribute of $13 a barrel for the beer that was produced.

And Frank Gabriel then took the witness stand and said that his driver—Berger, I think it was—was arrested on a truck drawing beer, and that he undertook to secure the services of Mr. Rose himself, and first undertook to locate him through his sister, who either worked at Mr. Rose's house or knew about him, who told him that he might locate him at Mr. Shields' office, and then went there for that purpose.

Now, what we may have said as to the testimony, you understand, is not conclusive upon you. You will remember what the testimony is. We have just touched some of the high spots in it, for the purpose of possibly calling to your attention some of the items of the testimony. Now, if you find from the situation of these parties, that there did a conspiracy exist for the taking out of this beer and the manufacture of this beer, as charged in the first count of the indictment, and some overt act was done

by one or more of them in the carrying out of that enterprise, and you become satisfied of that by the proofs, beyond a reasonable doubt, then you would be justified under your oaths in finding a verdict of guilty as to those persons whom you find participated in that conspiracy.

As to the second, third and fourth counts, you have to find by the proof beyond a reasonable doubt whether or not these several parties who pleaded not guilty here were parties to the possession of this beer and other liquors, to the possession of the property and material testified to, for the manufacture of beer, and to the maintenance of a common nuisance upon these premises. The whole evidence in the case is for you. The facts of the case are entirely for you. There is a sharp dispute in testimony between Shields, Rothstein, Widman, Holzman and Dicklich, as to this $13 payment. We cannot tell you which one of the witnesses to believe as to that. That is your province. You must say where the truth of the matter lies. You have a right to determine from their appearance on the witness stand their interest in this enterprise, what the correct state of affairs is and who is telling the truth. We cannot tell you who is telling the truth. That is entirely your province. Would Mr. Shields have been interested in this matter to the extent of putting in $500 of his own money, if he had not had some other other vital interest in the property? Who is telling the truth?

Now, in considering the testimony of Julius Rothstein and William Holzman, you will have to scrutinize that testimony carefully. They are self-confessed violators of the law, and the rule is that testimony of that kind must be carefully scrutinized. Upon that

testimony alone you can find a verdict, even, if you believe it, but it should be carefully scrutinized by the jury. The same thing may be said in regard to the testimony of Milan Dicklich, who was called as a witness on behalf of the defendants. He entered a plea of guilty in this case, and was a party to the violation of the law. His testimony ought to be scrutinized with the same degree of care that you are called upon to scrutinize the testimony of Julius Rothstein and William Holzman, the witnesses offered by the Government in this particular matter.

Have counsel on either side a request for further or additional charges on any point that we may have omitted?

By Mr. Rose:

If the Court please, I believe, as a matter of inadvertence, in reviewing the testimony in the case, you have stated that Mr. J. L. Simler signed the indemnity bond for the rent and in connection with the application for—

By the Court:

Just let me see the bond. I may have said that.

By Mr. Rose:

Mr. Simler did not sign either one of those bonds.

By the Court:

Yes. Gentlemen of the jury, if I said that, I desire to correct myself, because I am assured by counsel that the bond was not executed by him, and therefore that phase of the evidence will not be considered by you, but you may have the bonds out with

you, and the other exhibits that are offered here, and can determine what the facts are from those.

By Mr. Rose:

If your Honor please, I think as a further inadvertence, you have stated, in reviewing the testimony, that Mrs. Della Hays Evans testified that Mr. Shields had given her a typewriter. That was only developed on the cross-examination of Mr. Shields. She did not so testify. I think Mr. Richardson will agree with me on that.

By Mr. Richardson:

Yes.

By the Court:

Gentlemen, it may be that she did not testify to that statement, and it was brought out on cross-examination of Mr. Shields, but whatever the situation is, you will understand your own remembrance of it is to govern with regard to this statement. I think, now the matter has been called to my attention, that it is correct that the matter was first brought out under cross-examination of Mr. Shields.

By Mr. Richardson:

I should like to have the Court charge as to entrapment, and also as to withdrawal of the conspirators after the conspiracy has been put into operation. Do you wish a written point on that?

By the Court:

What is your suggestion?

By Mr. Richardson:

I would like to have the Court charge that the fact that a person, after entering into a con-

spiracy with another, with intent to commit crime, withdraws from the agreement does not, for obvious reasons, prevent his conviction for the conspiracy.

By the Court:

Gentlemen, counsel for the Government has called my attention to the question of entrapment. You will recall that the witness Parker testified to what occurred between himself and Mr. Shields as to this expediting of this application of the Conemaugh Products Company, and the arrangement was made whereby the $500 was paid. Now, if the defendant Daniel Shields was entrapped into making that payment, or induced by such entrapment to pay that $500, then the evidence as to that should not be considered by the jury. It is not, however, entrapment where the Government agent merely offers an opportunity to some person to do an unlawful act, and does not coerce or induce him into the performance of that act. Now, so far as concerns the present case, you will recall that after this meeting in Baltimore Shields went away, and that the money came by letter from Johnstown. So that if you find that the witness Parker merely offered or made the opportunity for Shields to pay that $500, it would not be entrapment, and especially in view of the fact in this case that Shields left and went away without the payment of any money, and the money came afterwards.

Now, as to the withdrawal from the conspiracy by a party who has entered into it, if you find that a conspiracy actually existed between certain persons, and that they formed it, and that an overt act was performed by any one of them, and one or more

By the Court:

Well, I think probably I ought to say that, so far as the first count is concerned, there must be two persons found to be involved in that before you would be justified in finding a verdict of guilty on the first count. You must be satisfied by the proof beyond a reasonable doubt that at least two persons were involved in a conspiracy. One person cannot conspire. So that, so far as the first count is concerned, there must be two conspirators found before there can be any verdict of guilty. So that, as to the first count, you must find at least two persons guilty before you would be justified in finding anybody guilty.

By Mr. Rose:

Second. The Court erred in charging the jury that a defendant to a bill of indictment cannot refuse to testify if called by the Government. Under the Act—

By the Court:

Under the National Prohibition Act, he may be called. The very fact that he is called secures his immunity.

By Mr. Rose:

But, your Honor, he may refuse to testify. A defendant may refuse to testify.

By the Court:

Well, it appears in this present case these defendants say they voluntarily appeared, and made no objection to testifying.

By Mr. Rose:

Of course, if your Honor please, any defendant in a bill of indictment, when called, under the Act, may refuse to testify.

By the Court:

Oh, yes; that is absolutely correct. Any defendant may refuse to testify.

By Mr. Rose:

Third. The Court erred in charging the jury that it is bound to accept the law as laid down by the Court. Our position is that the jury is not bound to accept the law as such, but that it is bound to accept the law, as the best evidence thereof, as it comes from the Court.

By the Court:

That looks to me rather like a distinction without a difference.

By Mr. Rose:

Yes, your Honor, the jury is judge of both the law and the facts. It is the sole judge of the facts, but it must accept the rendition of the law by the Court as the best evidence thereof. But still it remains judge of the law.

By the Court:

What have you to say as to that, Mr. Richardson?

By Mr. Richardson:

I can only answer the way you did. It seems to me a distinction without a difference.

By Mr. Rose:

There is a wide distinction.

By the Court:

We will note you an exception.

By Mr. Rose:

Fourth. The Court erred in charging the jury that the testimony of Milan Dicklich, a defendant in the case, who was called on behalf of the six defendants whom we represent, must be viewed with the same care and caution as the testimony of Julius Rothstein and William Holzman. Our contention here is that Milan Dicklich having been called by the defendants, his testimony is not to be considered in the same sphere of that of an accomplice who testifies against another accomplice. He is called here as a co-defendant.

By the Court:

What have you to say as to that, Mr. Richardson?

By Mr. Richardson:

I believe the rule applies as well to a witness who testifies on behalf of his co-defendants as to one who testifies for the Government, and I think that the jury should be instructed, as they were, that his testimony should be scrutinized with care. I think your instruction is correct on that.

By Mr. Rose:

I might suggest, with the permission of your Honor, that in this case no gain is to be made or subserved by Milan Dicklich testifying in the case. So far as his connection with the case is concerned, it is over.

By the Court:

Well, does that go to the question of gain? The question is whether or not he is a self-con-

fessed accomplice in this enterprise, and the same rule ought to apply to every man who is of that character, that the testimony must be scrutinized with care.

By Mr. Rose:

That is a part of the reason for the rule, but the paramount reason is that an accomplice is presumed to have in mind some kind of aggrandizement from his testimony implicating his accomplices. But here Milan Dicklich has no such end to attain, because his case under this bill of indictment is disposed of; he has paid his penalty.

By the Court:

We will note you an exception.

By Mr. Rose:

Furthermore, if your Honor please, our next exception will be that in charging the jury of the facts in this case, the Court lent too much emphasis to the testimony of the witnesses for the Government and did not give sufficient consideration to the testimony adduced on behalf of the defendants.

By the Court:

We note you an exception in that particular.

Exceptions noted to defendants John Emmerling and Charles G. Lynch to refusal to give binding instructions.

(Jury retires.)

PETITION FOR EXCEPTIONS.

The petition of Daniel J. Shields respectfully represents:

1. That he is one of the defendants in the above stated case.

2. That in the trial thereof he was represented by Percy Allen Rose and Charles E. Copeland as attorneys.

3. That after the said case was submitted to the jury it retired and deliberated for several hours.

4. That during the course of the jury's deliberation it submitted to the court the following tentative verdict and asked for instructions from the court thereon, to wit:

"To the Honorable Court:

Sir:

We, the jury, find the defendants John G. Emmerling, Charles Lynch not guilty on all counts, E. W. Hardison, J. E. Hunter and J. L. Simler guilty on all counts. Daniel J. Shields, Harry Widman, J. M. Gastman unable to agree.

Signed,

E. B. MILLIGAN,

Foreman."

5. That in response to the jury's request for further instructions the trial judge instructed them further in writing as follows:

"Feb. 13, 1926.

The jury will have to find also whether Shields, Widman and Gastman are guilty or not guilty.

F. P. SCHOONMAKER,

Judge."

6. That neither your petitioner, the said defendant, nor either of his attorneys was present in court at the time of the submission of the said tentative verdict and the said additional instructions in writing by the Court.

7. That neither your petitioner, the said defendant, nor either of his attorneys had any knowledge or notice at the time of the submission of the said tentative verdict and the said additional instructions in writing by the court.

8. That neither the petitioner, the said defendant, nor either of his attorneys had notice of the submission of the said tentative verdict and the said additional instructions in writing by the court until the 21st day of April, 1926.

9. That if your petitioner, the said defendant, or either of his attorneys had received notice of the submission of the said tentative verdict and the said additional instructions in writing by the court objection would have been urged to the said additional instructions by your petitioner's said attorneys.

10. That under the Act of June 1, 1872, c. 225, Sec. 10, Sec. 1702, Judicial Code (R. S., Sec. 1036), U. S. Compiled Statutes 1916, Vol. 3, page 3560, the jury was permitted to find some of the co-defendants with your petitioner guilty, others not guilty and disagree as to others of the said defendants.

Your petitioner therefore respectfully prays the Court to grant and note him an exception to the said additional instructions in writing by the Court to the said jury.

(Sgd.) DANIEL J. SHIELDS.

State of Pennsylvania,
County of Cambria, } *ss:*

On the 1st day of May, A. D. 1926, before me, the subscriber, a Notary Public in and for said County, personally came Daniel J. Shields, the above named petitioner, who, being by me duly sworn according to law, did depose and say that the matters set forth in the above and foregoing petition are true and correct.

(Sgd.) DANIEL J. SHIELDS.

Sworn and subscribed to before me the day and year aforesaid, as witness my hand and Notarial Seal.

Sgd. DULCIE G. GATES,
Notary Public.

My commission expires Jan. 20, 1930.

ORDER REFUSING TO GRANT EXCEPTION.

And now, May 3rd, A. D. 1926, the above and foregoing petition read and considered and the prayer thereof is hereby refused and the court refuses to grant the said defendant, Daniel J. Shields, an exception to the said additional instructions in writing by the court to the said jury, to wit:

"Feb. 13, 1926.

The jury will have to find also whether Shields, Widman and Gastman are guilty or not guilty.

F. P. SCHOONMAKER,
Judge."

for the reason that counsel for the defendant, Daniel J. Shields, requested the court to hold the jury in deliberation until they should agree upon a verdict, and therefore when the court received the communication from the jury, it was returned with the instructions complained of, although it is true that the defendant's counsel was not present when the communication was handed to the court from the jury.

(Sgd.) PER CURIAM.

S.

Eo die an exception to the above refusal to grant an exception is hereby noted to the defendant, Daniel J. Shields.

F. P. SCHOONMAKER, [SEAL]
Judge.

EXCEPTION TO ORDER DENYING MOTION FOR NEW TRIAL.

And now, May 14th, A. D. 1926, Daniel J. Shields, by his attorney, Percy Allen Rose, excepts to the order and decree of the Court overruling his motion for new trial and prays that an exception be noted and a bill sealed, all of which the day and date aforesaid is accordingly allowed and granted.

(Sgd.) F. P. SCHOONMAKER, [SEAL]
Judge.

CERTIFICATE OF JUDGE.

I, F. P. Schoonmaker, Judge of the District Court of the United States for the Western District of Pennsylvania, do hereby certify that the foregoing Bill of Exceptions tendered by the defendant, Daniel

J. Shields, is correct in every particular, and is hereby settled and allowed and made a part of the record in the above entitled case.

Dated July 24, 1926.

F. P. SCHOONMAKER,
Judge.

Motion for New Trial and Arrest of Judgment and Reasons in Support Thereof.

Filed Feb. 16, 1926.

And now, February 16th, A. D. 1926, Daniel J. Shields, J. L. Simler, J. M. Gastman, Herman Widman, J. E. Hunter and C. W. Hardison come into Court and by their attorneys, Percy Allen Rose and Charles D. Copeland, move for a new trial and in arrest of judgment in the above stated case, and in support thereof file the following reasons:

FIRST. The Court erred in charging the jury that they were bound to take the law as laid down by the Court.

SECOND. The Court erred in the said charge through said instruction in withholding from the jury their right to ultimately determine both the law and the facts and to apply the law so declared to the facts as presented in the trial of the case.

THIRD. The Court erred in charging the jury that the evidence of Milan Dicklich, a defendant who had plead guilty to the bill, had been sentenced and undergone his punishment, and who

was called by the defendants, must be viewed or considered with care and caution.

FOURTH. The Court erred in their charge to the jury to the effect that there was not sufficient evidence in the case to establish the entrapment of the one defendant, Daniel J. Shields.

FIFTH. The Court erred in the said instruction in expressing their opinion as to the sufficiency of the evidence to establish the entrapment of the said defendant, Daniel J. Shields, and withholding from the jury the free and untrammeled right to determine the said question of entrapment.

SIXTH. The Court erred in expressing their opinion as to the sufficiency of the evidence to establish the entrapment of the said defendant, Daniel J. Shields, after the case had been submitted to the jury and they had reported their inability to agree upon a verdict.

SEVENTH. The Court erred in answer to a question by one of the jurors in the case after its submission to the jury and they had reported their inability to agree, that in the opinion of the Court an entrapment had not been established but that the actions of the Federal Officers had simply afforded the opportunity of entrapment.

EIGHTH. The Court erred in their charge to the jury in unduly emphasizing certain portions of the testimony presented by the Government and in minimizing certain parts of the testimony offered by the defendants and their witnesses.

NINTH. The Court erred in their charge to the jury in attaching too much importance to the testimony of the Government relative to the payment by the defendant, Daniel J. Shields, to the Government's representative, Eddie Parker, of the sum of $500.00 and in not reviewing at sufficient length the testimony of the said Daniel J. Shields as to the circumstances under which the said amount was paid.

TENTH. The Court erred in admitting over the objection of the said defendants the bill in equity of *United States vs. the Windber Brewery Company, the Windber Products Company, J. M. Gastman, Herman Widmann and J. L. Simler* for the purpose of ascertaining the creditability of the said J. M. Gastman.

ELEVENTH. The Court erred in permitting the said answer to go to the jury as against the said J. L. Simler and Herman Widmann.

TWELFTH. The verdict of guilty as to J. L. Simler, J. E. Hunter and C. W. Hardison of the third count in the bill of indictment charging them with the unlawful possession of intoxicating liquor and of the fourth count thereof charging them with the unlawful possession of apparatus cannot be sustained nor can any judgment be entered thereon as the second count of the said bill of indictment charges the said defendants with the unlawful manufacture of intoxicating liquors.

The said defendants reserve the right to file additional reasons in support of their said motion upon

the transcription and filing of the last day's notes of testimony and the charge of the Court.

J. L. SIMLER,
J. M. GASTMANN,
HERMAN WIDMANN,
J. E. HUNTER,
C. W. HARDISON.

PERCY ALLEN ROSE,
CHARLES D. COPELAND,
Attorneys for said Defendants.

United States of America,
State of Pennsylvania, } *ss:*
County of Cambria,

On the 16th day of February, A. D. 1926, before me, the subscriber, a Notary Public in and for said State and County, personally came Daniel J. Shields, J. L. Simler, J. M. Gastman, Herman Widmann, J. E. Hunter and C. W. Hardison, who, being by me duly sworn according to law, did depose and say that the matters set forth in the above and foregoing reasons are true and correct to the best of their knowledge, information and belief.

J. L. SIMLER,
J. M. GASTMANN,
HERMAN WIDMANN,
J. E. HUNTER,
C. W. HARDISON.

Sworn and subscribed to before me the day and year aforesaid, as witness my hand and Notarial Seal.

DULCIE G. GATES,

[SEAL] *Notary Public.*

My commission expires Jan. 20, 1930.

Now Feb. 16, 1926, let this motion be filed.

PER CURIAM.

S.

Additional Reasons in Support of Motion for New Trial and in Arrest of Judgment on Behalf of Daniel J. Shields.

Filed April 22, 1926.

And now, April 22nd, A. D. 1926, Daniel J. Shields, one of the above named defendants, by his attorneys, Percy Allen Rose and Charles E. Copeland, file the following additional reasons in support of the motion heretofore filed for new trial and in arrest of judgment in the above stated case, to wit:

THIRTEENTH. The Court erred in answering the question of the jury for further instructions after it had deliberated for several hours and had returned to the Court for further instructions, by instructing it that it could not convict some of the defendants and disagree as to others.

FOURTEENTH. The jury having reported to the Court its proposed finding as follows:

"To the Honorable Court:

Sir:

We, the jury find the defendants John G. Emmerling, Charles Lynch not guilty on all counts. E. W. Hardison, J. E. Hunter and

J. L. Simler guilty on all counts. Daniel J. Shields, Harry Widman, J. M. Gastman unable to agree.

Signed E. B. MILLIGAN,
Foreman."

The Court erred in further instructing the jury as follows, to wit:

"Feb. 13, 1926.

The jury will have to find also whether Shields, Widman and Gastman are guilty or not guilty.

F. P. SCHOONMAKER,
Judge."

PERCY ALLEN ROSE,
CHARLES D. COPELAND,
Attorneys for Daniel J. Shields.

Additional Reasons in Support of Motion for New Trial and in Arrest of Judgment.

Filed April 30, 1926.

And now, April 28th, A. D. 1926, Daniel J. Shields, one of the above named defendants, by his attorneys, Percy Allen Rose and Charles E. Copeland, files the following additional reasons in support of the motion heretofore filed for a new trial and in arrest of judgment in the above stated case, to wit:

FIFTEENTH. The Court erred in further instructing the jury, after their deliberation for several hours and their submission to the Court of a tentative verdict in the absence and without

notice to the said defendant or either of his attorneys, which said tentative verdict and further instruction of the Court are as follows:

"To the Honorable Court:

Sir:

We, the jury find the defendants John G. Emmerling, Charles Lynch not guilty on all counts. E. W. Hardison, J. E. Hunter and J. L. Simler guilty on all counts. Daniel J. Shields, Harry Widman, J. M. Gastman unable to agree.

Signed,

E. B. MILLIGAN,

Foreman."

"Feb. 13, 1926.

The jury will have to find also whether Shields, Widman and Gastman are guilty or not guilty.

F. P. SCHOONMAKER,

Judge."

PERCY ALLEN ROSE,

CHARLES E. COPELAND,

Attorneys for Daniel J. Shields.

Order of Court.

And now May 11, 1926, upon due consideration of defendant's motion for a new trial as well as the additional reasons therefor filed since the filing of the original motion, and after a careful review of the whole case, we are convinced that the motion is without merit and therefore deny it.

PER CURIAM.

S.

Sentence.

Filed June 12th, 1926.

And now, to wit, June 12th, A. D. 1926, the sentence of the Court is that you pay a fine to the United States of Two Thousand Dollars; that you be imprisoned in the Cambria County Jail for and during the term of one year, and be subject to the same discipline and treatment as convicts sentenced by the Courts of the State; and while so confined therein you shall be exclusively under the control of the officers having charge of the said jail, and stand committed until this sentence be complied with. Sentence to run from this date.

PER CURIAM.

S.

Assignments of Error.

Filed June 12, 1926.

And now, June 12th, 1926, comes Daniel J. Shields, the above named defendant, and files herewith his petition for a writ of error to the Circuit Court of Appeals of the United States for the Third Circuit thereof, and says that there are errors in the record and proceedings of the above entitled case and for the purpose of having the same reviewed in the said Circuit Court of Appeals assigns the following errors:

FIRST. The Court erred in charging the jury that they were bound to accept the law as laid down by the Court as follows:

> "The law of this case is for the Court. It is our duty to instruct you as to the law, and it is your duty to accept the law as we lay it down to you. If we happen to make a mistake as to the law that may be corrected by an appeal to the higher Court."

TWO. The Court erred in charging the jury that the evidence of Milan Diklich, a defendant in the said case who had plead guilty to the bill, had been sentenced and undergone his punishment and who was called by the defendants, must be viewed or considered with care and caution, as follows:

> "Now, in considering the testimony of Julius Rodstein and William Holzman, you will have to scrutinize that testimony carefully. They are self-confessed violators of the law, and the rule is that testimony of that kind must be carefully scrutinized. Upon that testimony alone you can find a

verdict, even, if you believe it, but it should be carefully scrutinized by the jury. The same thing may be said in regard to the testimony of Milan Dicklich, who was called as a witness on behalf of the defendants. He entered a plea of guilty in this case, and was a party to the violation of the law. His testimony ought to be scrutinized with the same degree of care that you are called upon to scrutinize the testimony of Julius Rothstein and William Holzman, the witnesses offered by the Government in this particular matter."

THIRD. The jury having deliberated for several hours and having reported to the Court its proposed finding or verdict, as follows:

"To the Honorable Court:

Sir:

We, the jury find the defendants John G. Emmerling, Charles Lynch not guilty on all counts. E. W. Hardison, J. E. Hunter and J. L. Simler guilty on all counts. Daniel J. Shields, Harry Widman, J. M. Gastman unable to agree.

Signed

E. B. MILLIGAN,
Foreman."

The Court erred in further instructing the jury in writing as follows, to wit:

"Feb. 13, 1926.

The jury will have to find also whether Shields, Widman and Gastman are guilty or not guilty.

F. P. SCHOONMAKER,
Judge."

FOUR. The Court erred in refusing to grant the prayer of the petition of the defendant, Daniel J. Shields, for an exception to the written instructions to the jury in the absence of the said defendant or his counsel, after they had deliberated for several hours and returned to the court room for further instructions, that they would have to find whether or not the defendants, Shields, Widman and Gastman, were guilty or not guilty, which petition and order of the Court thereon are as follows:

"The petition of Daniel J. Shields respectfully represents:

1. That he is one of the defendants in the above stated case.

2. That in the trial thereof he was represented by Percy Allen Rose and Charles E. Copeland as attorneys.

3. That after the said case was submitted to the jury it retired and deliberated for several hours.

4. That during the course of the jury's deliberation it submitted to the court the following tentative verdict and asked for instructions from the court thereon, to wit:

'To the Honorable Court:

Sir:

We, the jury find the defendants John G. Emmerling, Charles Lynch not guilty on all counts, E. W. Hardison, J. E. Hunter and J. L. Simler guilty on all counts, Daniel J.

Shields, Harry Widman, J. M. Gastman unable to agree.

Signed,

E. B. MILLIGAN,

Foreman.'

5. That in response to the jury's request for further instructions the trial judge instructed them further in writing as follows:

'Feb. 13, 1926.

The jury will have to find also whether Shields, Widman and Gastman are guilty or not guilty.

F. P. SCHOONMAKER,

Judge.'

6. That neither your petitioner, the said defendant, nor either of his attorneys was present in court at the time of the submission of the said tentative verdict and the said additional instructions in writing by the court.

7. That neither your petitioner, the said defendant, nor either of his attorneys had any knowledge or notice at the time of the submission of the said tentative verdict and the said additional instructions in writing by the court.

8. That neither the petitioners, the said defendant, nor either of his attorneys had notice of the submission of the said tentative verdict and the said additional instructions in writing by the court until the 21st day of April, 1926.

9. That if your petitioner, the said defendant, or either of his attorneys had received notice

of the submission of the said tentative verdict and the said additional instructions in writing by the court objection would have been urged to the said additional instructions by your petitioner's said attorneys.

10. That under the Act of June 1, 1872, c. 225, Sec. 10, Sec. 1702 Judicial Code (R. S. Sec. 1026), U. S. Compiled Statutes 1916, Vol. 3, page 3560, the jury was permitted to find some of the co-defendants with your petitioner guilty, others not guilty and disagree as to others of the said defendants.

Your petitioner therefore respectfully prays the Court to grant and note him an exception to the said additional instructions in writing by the Court to the said jury.

DANIEL J. SHIELDS.

State of Pennsylvania }
County of Cambria } *ss:*

On the 1st day of May, A. D. 1926, before me, the subscriber, a Notary Public in and for said County, personally came Daniel J. Shields, the above named petitioner, who, being by me duly sworn according to law, did depose and say that the matters set forth in the above and foregoing petition are true and correct.

DANIEL J. SHIELDS.

Sworn and subscribed to before me the day and year aforesaid, as witness my hand and Notarial Seal.

DULCIE G. GATES,

[SEAL] *Notary Public.*

My commission expires Jan. 20, 1930.

ORDER.

And now, May 3rd, A. D. 1926, the above and foregoing petition read and considered and the prayer thereof is hereby refused and the court refuses to grant the said defendant, Daniel J. Shields, an exception to the said additional instructions in writing by the court to the said jury, to wit:

'Feb. 13, 1926.

The jury will have to find also whether Shields, Widman and Gastman are guilty or not guilty.

F. P. SCHOONMAKER,
Judge.'

for the reasons that counsel for the defendant, Daniel J. Shields, requested the Court to hold the jury in deliberation until they should agree upon a verdict and therefore when the court received the communication from the jury it was returned with the instructions complained of although it is true that the defendant's counsel was not present when the communication was handed to the court from the jury.

PER CURIAM.

S."

FIVE. The Court erred in admitting the evidence of Julius Rodstein, one of the defendants in the case who was called by the Government under promise and assurance of immunity, the substance of whose testimony is as follows:

That he, Julius Rodstein and his associates were purchasing beer of a prohibitive alcoholic

content from the Conemaugh Products Company through Daniel J. Shields prior to September, 1924; that thereafter he and his associates purchased from Daniel J. Shields the Emmerling Products Company for the sum of $50,000.00, $25,000.00 in cash and the balance in payments; that after the said purchase he and his associates were subject to the domination of the said Daniel J. Shields to whom they paid $13.00 a barrel for beer by way of protection from prosecution and interference by the officers of the law; that in all the payments for such amounted to $80,000.00, and that several days prior to the raid by the federal officers on the Conemaugh Products Company, which resulted in the indictment in this case, he was notified by the said Daniel J. Shields to empty the brewery immediately.

SIX. The Court erred in admitting the evidence of William Holtzman, one of the defendants in the case who was called by the Government under promise and assurance of immunity, the substance of whose testimony is as follows:

That he, William Holtzman and his associates were purchasing beer of a prohibitive alcoholic content from the Conemaugh Products Company through Daniel J. Shields prior to September, 1924; that thereafter he and his associates purchased from Daniel J. Shields the Emmerling Products Company for the sum of $50,000.00, $25,000.00 in cash and the balance in payments; that after the said purchase he and his associates were subject to the domination of the said Daniel

J. Shields to whom they paid $13.00 a barrel for beer by way of protection from prosecution and interference by the officers of the law, and that in all the payments for such amounted to $80,000.00.

For which errors the defendant, Daniel J. Shields, prays that the judgment and sentence of the District Court of the United States for the Western District of Pennsylvania dated the 12th day of June, A. D. 1926, be reversed.

MAX V. SCHOONMAKER,
PERCY ALLEN ROSE,
Attorneys for Daniel J. Shields,
Plaintiff in Error.

Praecipe Sur Contents of Record.

Filed July 19, 1926.

To J. Wood Clarke,
Clerk:

Sir:

Please take notice that Daniel J. Shields, a defendant in the above entitled case and plaintiff in error, will incorporate in the record sur writ of error the following portions of the file, to wit:

1. Docket entries.
2. Bill of indictment.
3. Charge of the Court.
4. Papers submitted setting forth verdict of jury and order of Court refusing same.
5. Petition for exception and order refusing to grant same.

6. Final verdict of jury as accepted by the Court.
7. Motion for New Trial and order refusing same.
8. Judgment.
9. Bill of exceptions.
10. Assignments of error.
11. Praecipe sur contents of record.
12. Clerk's certificate.

MAX V. SCHOONMAKER,
PERCY ALLEN ROSE,
Per M. V. S.
Attorneys for Daniel J. Shields.

Certificate.

Western District of Pennsylvania, ss:

I, J. Wood Clark, Clerk of the District Court of the United States for the Western District of Pennsylvania, do hereby certify that the annexed and foregoing pages contain a true and correct copy of the record sur Writ of Error in the above entitled case, so full and entire as the same remains of record and on file in my office, in the City of Pittsburgh, in said District.

IN TESTIMONY WHEREOF, I have hereunto signed my name and affixed the seal of the said Court at Pittsburgh, this ..... day of ....., A. D. 1926.

J. WOOD CLARK,
Clerk.

IN THE

United States Circuit Court of Appeals

FOR THE THIRD CIRCUIT.

NO. 3512.

DANIEL J. SHIELDS, Defendant Below,
Plaintiff-in-Error,

v.

THE UNITED STATES.

Error to the Judgment and Sentence of the District Court of the United States for the Western District of Pennsylvania at No. 668 Criminal.

And afterwards, to wit, on the tenth day of November, 1926, came the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and brief, before the Honorable Joseph Buffington, Honorable Victor B. Woolley and Honorable J. Warren Davis, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof.

And afterwards, to wit, on the eleventh day of January, 1927, comes the parties aforesaid by their counsel aforesaid, and the Court, now being fully advised in the premises, renders the following decision:

Opinion.

Before BUFFINGTON, WOOLLEY and DAVIS,
Circuit Judges.

BUFFINGTON, *Circuit Judge*:

In the Court below, Daniel J. Shields, Milan Dicklick, Julius Rothstein, William Holtzmann, and a number of other persons, were jointly indicted for violation of the National Prohibition Act. Before the trial, Dicklick pleaded *nolle contendere* and was sentenced. See *Hudson v. United States*, 14 Fed. (2d), 497, ... U. S., ... Subsequently, Rothstein, Holtzmann, Shields and sundry other defendants went to trial and, confining our attention to his case, Shields was found guilty, was sentenced and thereafter sued out this writ of error. After due consideration we now hold, for the reasons we now state, that no error was committed and therefore that the judgment of the Court below be affirmed as to him. The alleged errors arise in this way: At the trial Shields himself went on the stand and testified in his own behalf. He called as a witness in his behalf, Dicklick, who had theretofore pleaded *nolle contendere* to the same joint offense with which Shields was being tried, and the Government called in its behalf Rothstein and Holtzman, who stood in the same general situation as Dicklick; that is, they also had admitted their guilty participation in the same joint offense with which Shields was being tried. In charging the jury, the trial judge in outlining the offense charged against Shields said: "The Government called the defendant Rothstein, who told about Daniel

Shields selling the brewery, and what occurred at the meeting at the office in the Capital Building, when Schuller, Simler, Widman and Gastman were present, where it was agreed that there should be paid $50,000, and $25,000 was paid. And Rothstein testified further to the agreement after Shields insisted upon $13 a barrel for protection; he said that that conversation, as we recall it, occurred in a room adjoining the one in which the other parties were. And Holzmann corroborates this same thing. Rothstein testified, as the result of that, he paid to Shields the sum of $80,521 as protection money." As to Dicklick's connection the Judge said: "Milan Dicklick was called to the witness stand and told us of his connection with this enterprise, and he said that no $13 arrangement was made; that they agreed to buy the brewery for $50,000, that they met at this office, that $25,000 was paid in currency at that time, and, as we recall it, he said that Simler furnished the paper to wrap up the money, but that nothing was said by Shields about requiring a tribute of $13 a barrel for the beer that was produced." Then after stating that "Shields himself took the witness stand in his own behalf, and absolutely denied any connection with this enterprise other than as a friend of the parties engaged", he went on to say: "There is a sharp dispute in testimony between Shields, Rothstein, Widman, Holzmann and Dicklick, as to the $13 payment. We cannot tell you which one of the witnesses to believe. That is your province. You may say where the truth of the matter lies. You have a right to determine from their appearance on the

witness stand, their interest in this enterprise, what is the correct state of affairs, who is telling the truth". Conceding as they must that this statement of the issue and the testimony was fair, the defendant, Shields, contends the court committed an error in using the language quoted below. It will be recalled that Dicklick, who had confessed his guilt, when called as a witness by Shields had confirmed Shields' testimony that he was innocent and that Holzmann and Rothstein, who were on trial and in their testimony confessed their guilt, were called by the Government, contradicted Shields and swore they had paid Shields eighty thousand dollars for protection money. Bearing on the testimony of all three self-confessed participants in the conspiracy charged, the Court then said—and herein is the alleged error—"Now, in considering the testimony of Julius Rothstein and William Holzmann, you will have to scrutinize that testimony carefully. They are self-confessed violators of the law, and the rule is that testimony of that kind must be carefully scrutinized. Upon that testimony alone you can find a verdict, even, if you believe it, but it should be carefully scrutinized by the jury. The same thing may be said in regard to the testimony of Milan Dicklick, who was called as a witness on behalf of the defendants. He entered a plea of guilty in this case, and was a party to the violation of the law. His testimony ought to be scrutinized with the same degree of care that you are called upon to scrutinize the testimony of Julius Rothstein and William Holzmann, the witnesses offered by the Government is this particular

matter," and the alleged error is in the court putting the testimony of all three men on a parity. Confessedly all three were in like situations as self-confessed violators of the law, etc. Their several interests in telling or concealing the truth might be different and might or might not affect their credibility with the jury, but in view of their admitted guilt, was there error in the Court cautioning the jury that as self-confessed violators of the law "that testimony of that kind must be carefully scrutinized?" Assuredly, as far as Rothstein and Holzmann's testimony was concerned this instruction was right and indeed Shields was entitled to have the caution of the court that testimony coming from that source "must be carefully scrutinized." But when Shields by calling Dicklick went to the same self-confessed source for testimony exculpating him, why was not the Court right in giving the same caution that it also "must be carefully scrutinized?" All three were participants in the same transaction. All were testifying about the same occurrence. All were confessedly guilty. Why should the testimony of two be carefully scrutinized and that of a third be not, to use the alleged erroneous words of the Court "scrutinized with the same degree of care that you are called upon to scrutinize the testimony of Julius Rothstein and William Holzmann, the witnesses offered by the Government in this particular matter?" The situation was one where equality of scrutiny was requisite because there was equality of self-confessed guilty source from which it came. And that such necessity of careful scrutiny applied alike to self-

confessed guilt no matter by which side the witness was called, seems recognized by the law.

In *Simpson v. State,* 78 Georgia, 91, it was held "that an accomplice is not as a general rule entitled to the full credit given to other witnesses, whether he be introduced by the state or by the defendant, without corroboration, seems to be well settled." And further, referring to the testimony of self-confessed guilty witnesses, the Supreme Court in *Crawford v. United States,* 212 U. S., 204—in that the witness was called by the Government—referred to the character of such witness in these general descriptive terms "The evidence of such a witness ought to be received with suspicion and with the very greatest care and caution, and ought not to be passed upon by a jury under the same rules governing other and apparently credible witnesses." Such being the case we hold it was not error, but indeed the duty of the Court, to caution the jury that the testimony of all three participants "must be carefully scrutinized."

The next error assigned is that the Court erred in admitting the testimony of Rothstein and Holzmann on behalf of the Government. These two men were defendants. They were represented by other counsel than Shields. They took part in the trial for two days, after which they turned state's evidence, were called by the Government and testified against objection by Shields' counsel. This is assigned as error, but we find no error in the Court so holding. The witnesses saw fit to voluntarily go on the stand and give their evidence. When called they were apprised of their rights by the Court, viz: "The

right of a defendant to remain silent is a personal right, and he is not obliged to respond to the call of the government unless he chooses. Apparently he has chosen to be sworn and testify as a witness on behalf of the government, and he may do so." It is argued at length that these witnesses were not entitled to the statutory immunity allowance (Sec. 30 of Title II of the National Prohibition Act) and therefore the Court erred in admitting their testimony at all. But this contention, even if well founded, is apart from the question before us for conceding for present purposes the immunity statute did not apply the government clearly had a right to use the testimony of these men if they confessed their guilt and voluntarily went on the stand.

It remains to consider one matter which is not assigned for error but which is urged upon us by counsel as a plain error apparent on the face of the record. As Rule 11 of this Court provides: "The court, at its option, however, may notice a plain error not assigned," we have the power to consider such error though not assigned. But after careful consideration we find no error in the Court's action.

The case involved many defendants, much testimony and necessarily much expense. When finally submitted to the jury all of the defendants charged were represented by the same counsel. Whatever was the inducing cause moving counsel for the defendants, whether they desired to end the case and avoid another trial by reason of disagreement, or whether they expected a verdict of acquittal if the jury were

not discharged, they joined with the counsel for the government and, as the record shows, "requested the Court to hold the jury in deliberation until they should agree upon a verdict." After remaining out some time the jury sent a note to the court stating, "We, the jury, find the defendants, John G. Emmerling, Charles Lynch not guilty on all counts. E. W. Hardison, J. E. Hunter and J. L. Simler guilty on all counts. Daniel J. Shields, Harry Widman, J. M. Gastman unable to agree. Signed, E. B. Milligan, Foreman." In reply the judge returned a note "The jury will have to find also whether Shields, Widman and Gastman are guilty or not guilty, F. P. Schoonmaker, Judge." The counsel for the defendants had left the court and were not in attendance when such action was taken. After further deliberation the jury returned a verdict finding all of the defendants, except Emmerling and Lynch, guilty. Subsequently the trial judge on application of counsel for Shields to grant an exception to said additional instructions in writing and thereby lay the foundation for an assignment of error, declined to do so, stating "for the reason that counsel for the defendant, Daniel J. Shields, requested the Court to hold the jury in deliberation until they should agree upon a verdict and therefore when the court received the communication from the jury it was returned with the instructions complained." It is not contended that the facts were not as stated by the Judge. Therefore we have before us the question whether when counsel in advance make a request to the court to do what the court subsequently does, can the Court be convicted of error for doing what counsel asked it to do?

The justified reliance of Court on the request of counsel; avoidance of abortive mistrials and the timely administration of a court's work, based on the verdict of a jury which had evidence to support it, all unite in making the case one where with one breath a court cannot be asked by counsel to take a step in a case and later be convicted of error because it has complied with such request, for as is said in *17 Corpus Juris* 373-4, "A defendant in a criminal case cannot complain of error which he himself has invited."

So holding the judgment below is affirmed.

Endorsements: 3512 Opinion of the Court by Buffington, J.

Rec'd & Filed Jan. 11, 1927.

SAUNDERS LEWIS, JR.,
Clerk.

In Error to the District Court of the United States, for the Western District of Pennsylvania.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Western District of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the

said District Court in this cause be, and the same is hereby affirmed.

Philadelphia,
January 11, 1927.

Per Curiam.
Buffington, Circuit Judge.

Endorsements:
3512

Order Affirming Judgment
Rec'd & Filed
Jan. 11, 1927.
Saunders Lewis, Jr., Clerk

Rec'd & Filed Feb 7, 1927.

SAUNDERS LEWIS, JR.,
Clerk.

Petition for Re-Hearing and Brief in Support Thereof.

To the Honorable the Judges of the United States Circuit Court of Appeals for the Third Circuit:

The petition of Daniel J. Shields, the above named plaintiff-in-error, respectfully presents:

That this case came before this Court on a Writ of Error duly issued by the District Court of the United States for the Western District of Pennsylvania and was heard by this Court on the 10th day of November, 1926; and that upon the 11th day of January, 1927, the opinion of this Court was handed down, affirming the judgment of the District Court.

That your petitioner is advised and believes that the judgment of this Court, as announced in its Opin-

ion of January 11, 1927, is based upon an erroneous application of the law to the facts in the case and upon a misapprehension of the actual facts, and the petitioner therefore prays for a re-hearing of the case for the following reasons:

That the Court, in overruling the third and fourth Assignments of Error, declared that the petitioner's rights had been waived by the action of his counsel, who, it is averred, "requested the Court to hold the jury in deliberation until they should agree upon a verdict." That there appears in the record no facts which establish the time, the circumstances and the conditions under which such alleged request is purported to have been made; that the only place in the record here reference is made thereto is in the Opinion and Order of the Court below of May 3, 1926, which contains merely the conclusion of the Court without further statement of fact, that the stenographic record of the case contains no record either of the alleged request or of the time, place and circumstances under which such request purports to have been made.

That by reason of the fact that your petitioner was, at the time, without knowledge of the alleged request of his counsel, the said request not having been made in open Court nor in the presence of your petitioner, and because of the fact that the counsel now representing your petitioner did not represent him at the time of the trial, and was without knowledge of the facts and was unable to ascertain the same from the record in the case, your petitioner's present counsel has undertaken to secure information as to the facts in connection therewith from the Trial Court, with

notice to and the consent of the prosecuting counsel in the case.

That the correspondence between petitioner's present counsel and the Trial Judge is presented herewith on page 9 of this Petition and Brief. That the facts, as disclosed by that correspondence, are as follows:

The jury, after trial, argument and charge, retired for deliberation on Friday afternoon, February 12, 1926. The jury remained in deliberation all night, and on Saturday morning, February 13, 1926 just before the convening of court, and a few minutes before 10 o'clock, Percy Allen Rose, counsel for your petitioner, and Assistant U. S. Attorney Richardson, went to the chambers of the Trial Judge before he had gone upon the bench and they both requested that the jury be held in deliberation until they should agree upon a verdict. Daniel J. Shields, the defendant and petitioner, was not present at the time this request was made and no one was present but the Trial Judge, Richardson and Rose. At the time this suggestion and request was made the jury had not been brought into Court for additional instructions. The Trial Judge cannot now recall the exact language used either by Mr. Rose or Mr. Richardson in requesting that the jury be held in further deliberation until they should agree upon a verdict. At about 10 o'clock the same morning (Saturday, February 13, 1926), the jury came into Court for further instructions on the question of entrapment, the additional instructions given by the Court at that time not being stenographically reported. After the jury had retired again they deliberated further until 2:30 o'clock on Saturday after-

noon, February 13, 1926, when they returned to the Court in the absence of the defendant and his counsel and advised the Court that they were unable to agree. There is no stenographic or other record as to what was said and just what occurred. Thereupon the jury returned for further deliberation and between 4:30 and 5:00 o'clock that afternoon the jury sent to the Court at chambers the following written communication:

"To the Honorable Court:

Sir:

We, the jury, find the defendants John G. Emmerling, Charles Lynch not guilty on all counts, E. W. Hardison, J. E. Hunter and J. L. Simler guilty on all counts, Daniel J. Shields, Harry Widman, J. M. Gastman unable to agree.

Signed,

E. B. MILLIGAN,

Foreman."

and that upon the receipt thereof the Trial Court replied in writing, in the absence of and without the knowledge of the accused and his counsel, the following instruction:

"Feb. 13, 1926.

The jury will have to find also whether Shields, Widman and Gastman are guilty or not guilty.

F. P. SCHOONMAKER,

Judge."

About a half hour later the verdict complained of was returned by the jury, wherein your petitioner was found guilty on the first count of the indictment and

recommended to the mercy of the Court. A verdict of not guilty was returned on the second, third and fourth counts.

That your petitioner is advised and believes that a request made by his counsel, whether formal or informal, and regardless of the language used in connection with the request, not made in open Court, nor in his presence and without his knowledge, regardless of the circumstances, cannot under the law constitute a waiver of his right to a trial by the law of the land.

That your petitioner is advised and believes that a request made by his counsel, whether formal or informal, and regardless of the language used in connection with the request, not made in open Court, nor in his presence and without his knowledge, regardless of the circumstances, cannot under the law constitute a waiver of his right to a trial by the law of the land.

That your petitioner is advised and believes that a request, such as was made in this case, made on the morning of the day following the retirement of the jury, even though made with his knowledge and consent (and in this case it was without either his knowledge or consent) could not bind him or constitute a waiver of any of his rights when an entirely new situation arose many hours later, which said new situation was not in contemplation and could not be foreseen at the time of the making of said request.

That your petitioner is advised and believes that a request such as was made in this case, even if made with the knowledge and consent of the petitioner (and in this case it was made without his knowledge and consent), was a mere request as to the manner in which the Trial Court should exercise the discretion

vested in him to determine how long a jury under proper instructions as to the law should remain in deliberation before being discharged by the Court as unable to agree, and that said request could not be construed as justifying the Court in instructing a jury in disregard of the provisions of the Act of Congress and of the legal rights of your petitioner to a trial in conformity with the law of the land.

That your petitioner is advised and believes that his constitutional and legal rights were denied by the Court when the Court, on February 13, 1926, communicated with the jury while the jury was in deliberation in the absence of, and without the knowledge of, your petitioner and his counsel.

That your petitioner is advised and believes that he was denied due process of law, when the Court, in disregard of the provisions of the Act of Congress of June 1, 1872, Section 1036 of Revised Statutes, which reads as follows:

> "On an indictment against several, if the jury cannot agree upon a verdict as to all, they may render a verdict as to those in regard to whom they do agree, on which a judgment shall be entered accordingly; and the cause as to the other defendants may be tried by another jury,"

instructed the jury, after it had returned a perfectly lawful form of verdict, disagreeing as to your petitioner, that "the jury *will have to find* also whether Shields, Widman and Gastman are guilty or not guilty."

That your petitioner is advised and believes that under the circumstances of this case, where the jury,

after being out all night, had returned twice for instructions, and later, after having been out more than twenty-four hours, had submitted a lawful form of verdict, in which they disagreed as to your petitioner, and that thereupon the Court instructed them that they would *have to find* whether your petitioner was guilty or not guilty, that such instruction by the Court constituted a coercion of a verdict from a reluctant jury and deprived the defendant of a fair trial and also of his constitutional right to due process of law.

That your petitioner is advised and believes that the constitution and laws guarantee to him the right to correct and accurate instructions by the Court as to the law of the land and as to the form and character of verdict which a jury shall have a right under their oaths to return, and that no act of your petitioner or his counsel can give to the Court the right to instruct a jury contrary to the plain provisions of the Act of Congress, as your petitioner believes was done in this case.

That your petitioner is advised and believes that the jury under their oaths and in the performance of their duty had a right to be instructed as to their rights and duties and to be advised in this case of the provisions of the Act of Congress, Revised Statutes 1036, but that on the contrary the instruction which they did receive constituted a coercion of the jury and a denial to your petitioner of his rights.

That your petitioner believes that the Opinion of this Court handed down on January 11, 1927, affirming the judgment of the Court below, is the result of a

misunderstanding and misapprehension by this Court of the facts which were construed in that Opinion as constituting a waiver of defendant's rights, which misapprehension was undoubtedly due to the fact that the actual and detailed facts in the case do not appear in the record.

That your petitioner prays the Court to accept and consider as a correct Statement of Facts as a part of the record for the purpose of the consideration of the case, the correspondence between his present counsel and the Trial Court, or, as an alternative, that this Court request the Trial Court, in connection with the hearing of the case, to file in this Court a certificate or statement of the facts in order that the record of the case may be supplemented so as to contain all of the facts in connection with the occurrences and incidents of the trial which are to be considered by the Court in determining the issue.

In view of the great importance of the legal and constitutional questions involved in this case, as well as the liberty of your petitioner, and for the further reason that all of the facts, surrounding and circumstances which have played such a vital part in determining the judgment of this Court do not appear in and form no adequate part of the record in the case, your petitioner respectfully and earnestly prays this Court to grant a re-hearing of this case.

And your petitioner will ever pray.

DANIEL J. SHIELDS,
Petitioner.

I hereby certify that the foregoing Petition is filed in good faith and is well founded and not made

for the purpose of delay, and that in my opinion the re-hearing herein prayed for should be granted.

E. LOWRY HUMES,
Attorney for Petitioner.

CORRESPONDENCE BETWEEN PETITIONER'S COUNSEL AND THE TRIAL COURT ESTABLISHING THE ACTUAL FACTS AND CIRCUMSTANCES AS TO WHICH THE RECORD IS SILENT.

E. Lowry Humes, Attorney at Law,
First National Bank Building,
Pittsburgh, Pa.
January 25, 1927.

Judge F. P. Schoonmaker,
United States District Court,
Pittsburgh, Pa.

Sir:

I desire to invite your attention to the opinion of the Circuit Court of Appeals for the Third Circuit by Judge Buffington in the case of Daniel J. Shields, plaintiff in error, v. the United States, defendant in error, wherein that Court says:

> "The case involved many defendants, much testimony and necessarily much expense. When finally submitted to the jury all of the defendants charged were represented by the same counsel. Whatever was the inducing cause moving counsel for the defendants, whether they desired to end the case and avoid another trial by reason of disagreement, or whether they expected a verdict of acquittal if the jury were not discharged, they joined with the counsel for the government and, as the

record shows, 'requested the Court to hold the jury in deliberation until they should agree upon a verdict.' After remaining out some time the jury sent a note to the court stating 'We, the jury find the defendants, John G. Emmerling, Charles Lynch not guilty on all counts. E. W. Hardison, J. E. Hunter and J. L. Simler guilty on all counts. Daniel J. Shields, Harry Widman, J. M. Gastman unable to agree. Signed, E. B. Milligan, Foreman.' In reply the judge returned a note 'The jury will have to find also whether Shields, Widman and Gastman are guilty or not guilty. F. P. Schoonmaker, Judge.' The counsel for the defendants had left the court and were not in attendance when such action was taken. After further deliberation the jury returned a verdict finding all of the defendants, except Emmerling and Lynch, guilty. Subsequently the trial judge on application of counsel for Shields to grant an exception to said additional instructions in writing and thereby lay the foundation for an assignment of error, declined to do so, stating 'for the reason that counsel for the defendant, Daniel J. Shields, requested the Court to hold the jury in deliberation until they should agree upon a verdict and therefore, when the court received the communication from the jury it was returned with the instructions complained.' It is not contended that the facts were not as stated by the Judge. Therefore we have before us the question whether when counsel in advance make a request to the court to do what the court sub-

sequently does, can the Court be convicted of error for doing what counsel asked it to do?

The justified reliance of Court on the request of counsel; avoidance of abortive mistrials and the timely administration of a court's work, based on the verdict of a jury which had evidence to support it, all unite in making the case one where with one breath a court cannot be asked by counsel to take a step in a case and later be convicted of error because it has complied with such request, for as is said in *17 Corpus Juris* 3734, 'A defendant in a criminal case cannot complain of error which he himself has invited.'

So holding the judgment below is affirmed."

Since the trial of the case and the argument thereof in the Circuit Court of Appeals, Percy Allen Rose, Esq., who represented Daniel J. Shields in the Court below, has ceased to represent him and I have just been retained.

A careful perusal of the record discloses that the only reference to the alleged fact upon which the opinion of the Circuit Court is based, namely, a request of defendant's trial counsel that the Court hold the jury in deliberation until they should agree upon a verdict, is contained in your order of May 3, 1926, refusing to grant an exception to the additional instructions given by you to the jury in writing. It is my understanding that you had reference to some remark made by Percy Allen Rose, Esq., who no longer represents the accused Unfortunately the remark of counsel is not in the record, nor is there in the record any statement of facts disclosing the stage

of the proceedings or the circumstances which induced the remark, which has been construed of sufficient significance to constitute a waiver of the rights guaranteed to the accused by the provisions of the Act of Congress of June 1, 1872, C-225, Section 10.

My abiding faith in your conscientious desire to see the law administered in strict conformity to all established rules of practice and procedure leads me to unhesitatingly invite your attention to the unfortunate condition of this record and to ask you to file of record in the case a full and complete statement of the facts, setting forth the time, circumstances and conditions which constituted the basis for the conclusion contained in your order of May 3, 1926.

A full and fair consideration of this case by the appellate courts will be aided and the constitutional guarantee of due process will be the better secured to the accused by such a statement.

It is my purpose to seek a rehearing of this case by the Circuit Court of Appeals and if necessary a further review of the judgment, and it is in these proceedings that I desire to add to the record the facts which I believe essential to the proper determination of the legal questions involved.

By hearsay, I have learned what I believe the facts to be, but I am without personal knowledge of them and I hesitate to undertake the presentation of them to an appellate court. The opinion of the Circuit Court of Appeals raises so clearly and definitely the issue as to whether or not the course of conduct of counsel of accused constitutes an attempted imposition upon the trial court and a consequent

waiver of the rights of the accused, that the facts out of which the issue arises should come from the Court, and the determination of that issue should rest upon the actual facts rather than upon the brief conclusions of the trial court arrived at during argument and in the absence of record facts from which they can be drawn.

The information which I have as to the facts is as follows:

The jury, after trial, argument and charge, retired for deliberation on Friday afternoon, February 12, 1926. That after deliberating all night, the jury came into Court on Saturday, February 13, about 10 o'clock A. M. for further instructions on the question of entrapment, the additional instructions given by the Court at that time not being stenographically reported. That at the conclusion of these additional instructions Percy Allen Rose at side bar made the request which is referred to in the Court's order of May 3, 1926. The form and wording of the request is unknown to me and to the accused.

After the jury had retired they deliberated further until about 2:30 o'clock on Saturday afternoon, February 13, 1926, when they returned to the Court, in the absence of the defendant and his counsel, and advised the Court that they were unable to agree. As to whether or not the Court gave them any further instructions at this time I have been unable to ascertain, as there appears no record, and the accused and his then counsel not being present, definite information is not available. At this time the jury once more retired to deliberate and between 4:30 and 5:00 o'clock

on the same afternoon the jury sent to the Court at chambers the following written communication:

"To the Honorable Court:
Sir:

We, the jury, find the defendants John G. Emmerling, Charles Lynch not guilty on all counts. E. W. Hardison, J. E. Hunter and J. L. Simler guilty on all counts. Daniel J. Shields, Harry Widman, J. M. Gastman unable to agree.

Signed E. B. MILLIGAN,
Foreman."

and that upon the receipt thereof the Court replied in writing, in the absence of and without the knowledge of, the accused and his counsel, the following written instruction:

"Feb. 13, 1926.

The jury will have to find also whether Shields, Widman and Gastman are guilty or not guilty.

F. P. SCHOONMAKER,
Judge."

As to whether or not my information as to the facts as above outlined is entirely correct I am without knowledge, and I presume that because of the omissions in the record, no one save the trial court itself is entirely familiar with all of the facts, and it is for this reason that I am assuming to communicate with you on the subject.

Under the peculiar circumstances of this case I can see no impropriety in the making of this request

and I sincerely trust that you will see no impropriety in granting the request.

Respectfully,

E. LOWRY HUMES,

Attorney for Daniel J. Shields.

E. Lowry Humes:

MB

UNITED STATES COURT

Pittsburgh

January 29, 1927

Major E. Lowry Humes,

Attorney at Law,

Pittsburgh, Pa.

Dear Sir:—

I acknowledge receipt of your letter of January 25th in which you invite my statement with reference to the case of *Daniel J. Shields, plaintiff-in-error, against the United States, defendant-in-error,* now pending in the Circuit Court of Appeals. Your letter has been called to the attention of U. S. Attorney Richardson, and he has no objection to my making a statement as to what took place when Attorney Rose asked the court to hold the jury in deliberation until they should agree upon a verdict.

Your information, as contained in your letter as to when and where this request was made, is not quite accurate. The facts are as follows:

> *"This case was submitted to the jury on the afternoon of Friday, February 12, 1926. The jury remained in deliberation all night, and on Saturday morning, February 13, 1926, just before the convening of court, and a few minutes before ten o'clock, Percy Allen Rose, counsel for the de-*

fendant Shields, and U. S. Attorney Richardson, came to chambers before I had gone upon the bench, and they both requested that the jury be held in deliberation until they should agree upon a verdict. Daniel Shields, the defendant, was not present at the time this request was made, and no one was present but the undersigned, Richardson, and Rose. At the time this suggestion and request was made, the jury had not been brought into court for additional instructions. I cannot now recall the exact language used either by Mr. Rose or Mr. Richardson in requesting that the jury be held in further deliberation until they should agree upon a verdict. Otherwise, I think the facts stated in your letter of January 25, 1927, are an accurate statement of what occurred."

I am returning your letter of January 25.

Very truly yours,

F. P. SCHOONMAKER,
United States District Judge.

(Note: The italics used in foregoing letters are counsels for the purpose of directing the Court's attention to the portion of the letters stating the facts involved in the case).

Order Denying Petition for Re-Hearing.

Per Curiam,

We are satisfied that all the matters now urged have had due consideration in our disposition of this case. Accordingly the motion for a rehearing is now denied.

Philadelphia,
February 14, 1927.

Endorsements:
3512
Order Denying Petition for
Rehearing
Rec'd & Filed
Feb. 14, 1927
Saunders Lewis, Jr., Clerk.

UNITED STATES OF AMERICA

Eastern District of Pennsylvania, }
Third Judicial Circuit, } *Sct.:*

I, Saunders Lewis, Jr., Clerk of the United States Circuit Court of Appeals, for the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original record and proceedings in this Court in the case of:

Daniel J. Shields,
Plaintiff in Error,
vs.
United States,
Defendant in Error,
No. 3512

on file, and now remaining among the records of the said Court, in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 19th day of February, in the year of our Lord one thousand nine hundred and twenty-seven, and of the Independence of the United States the one hundred and fifty-first.

SAUNDERS LEWIS, JR.,
Clerk of the U. S. District Court of Appeals, Third Circuit.

Office Supreme Court, U.
FILED
FEB 28 1927
WM. R. STANSBU
CLER

No. 944

IN THE

Supreme Court of the United States

NO. ..... OCTOBER TERM, 1927.

DANIEL J. SHIELDS, Petitioner,

v.

THE UNITED STATES OF AMERICA, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

E. LOWRY HUMES,
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IN THE

Supreme Court of the United States

NO. ..... OCTOBER TERM, 1927.

DANIEL J. SHIELDS, Petitioner,

v.

THE UNITED STATES OF AMERICA, Respondent.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit and Brief in Support Thereof.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of the undersigned, Daniel J. Shields, respectfully presents:

That your petitioner was placed upon trial at a regular term of the United States District Court for the Western District of Pennsylvania on the 8th day of February, 1926, on an indictment containing five counts. The first count charged a conspiracy to violate the provisions of Section 3 of Title II. of the Act of October 28, 1919, known as the National Prohibition Act. The second, third, fourth and fifth counts charged the direct violation of Section 3, Section 25 and Section 21 of the National Prohibition Act.

That the jury, on February 13, 1926, found your petitioner not guilty on the second, third and fourth counts and guilty on the first count and recommended him to the mercy

of the Court. As to the fifth count in the indictment, the verdict is silent. On June 12, 1926, your petitioner was sentenced to pay a fine of Two Thousand ($2,000.00) Dollars and to be imprisoned in the Cambria County Jail for the term of one year.

That this case was duly appealed to the Circuit Court of Appeals for the Third Circuit and came on to be heard in the Circuit Court of Appeals for the Third Circuit, on the 10th day of November, 1926, and that upon the 11th day of January, 1927, the Opinion of the Circuit Court of Appeals was delivered and filed, affirming the judgment of the District Court against your petitioner, Daniel J. Shields.

That upon the 7th day of February, 1927, your petitioner filed his Petition and Brief in support thereof in the Circuit Court of Appeals, praying for a rehearing of the case, and on February 14, 1927, a rehearing was denied.

That after the jury had retired to deliberate upon a verdict, and after having deliberated all night and having twice returned to the Court for further instructions, the said jury, after having been in deliberation for more than twenty-four hours, sent to the Trial Judge at chambers the following note:

> "To the Honorable Court:
>
> Sir:
>
> We, the jury, find the defendants John G. Emmerling, Charles Lynch not guilty on all counts. E. W. Hardison, J. E. Hunter and J. L. Simler guilty on all counts. Daniel J. Shields, Harry Widman, J. M. Gastman unable to agree.
>
> (Signed) E. B. MILLIGAN,
> *Foreman.*"

Whereupon the Trial Judge, in the absence of your petitioner and his counsel, and without their knowledge, sent to

the jury, which was deliberateing in its jury room, the following written instruction:

"Feb. 13, 1926.

The jury will have to find also whether Shields, Widman and Gastman are guilty or not guilty.

(Signed) F. P. SCHOONMAKER,
Judge."

That the Circuit Court of Appeals for the Third Circuit, in affirming the judgment of the United States District Court for the Western District of Pennsylvania, has decided an important question of general law in an untenable way and in conflict with the weight of authority.

That the said Circuit Court of Appeals has decided a federal question in such a manner as to be in conflict with the applicable decisions of this Court, as announced in its opinions in the case of *Bucklin v. United States,* 159 U. S. 682; 16 Supreme Court Reporter 182, and *Fillipon v. Albion Vein Slate Company,* 250 U. S. 76; 39 Supreme Court Reporter 435; *Hopt v. Utah,* 110 U. S. 574; 4 Supreme Court Reporter 202, and has so far departed from the accepted and usual course of judicial proceedings, and has so far sanctioned such departure by the United States District Court for the Western District of Pennsylvania, as to call for the exercise of this Court's power of supervision, and further, that the judgment of the Circuit Court of Appeals deprives your petitioner of his constitutional right to be tried by the law of the land, and disregards and violates Section 1036 of the Revised Statutes of the United States.

That your petitioner believes that the aforesaid judgment of the Circuit Court of Appeals for the Third Circuit is erroneous, and that this Court should require the said case to be certified to it for its review and determi-

nation in conformity with the provisions of the Act of Congress in such cases made and provided.

WHEREFORE, Your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this Court directed to the United States Circuit Court of Appeals for the Third Circuit, commanding the said Court to certify and send to this Court on a day certain to be therein designated a full and complete transcript of the record, and all proceedings in said Circuit Court of Appeals in the said case therein entitled "Daniel J. Shields, plaintiff-in-error, v. the United States, No. 3512, October Term 1926" to the end that said case may be reviewed and determined by this Court, as provided by Section 240 of the Judicial Code of the United States, as amended by the Act of Congress of February 13, 1925, and that your petitioner may have such other and further relief or remedy in the premises as to this Court may seem appropriate and in conformity with said Act, and that the said judgment of the said Circuit Court of Appeals for the Third Circuit in said case and every part thereof may be reversed and remanded by this Court.

And your petitioner will every pray.

.....

Petitioner.

State of Pennsylvania,
County of Allegheny. } ss:

Personally appeared before me, a Notary Public, in and for the county and state aforesaid, Daniel J. Shields, who being duly sworn according to law deposes and says that he has read the foregoing petition, and that the same is true as he is informed and verily believes, and that his knowledge is derived from the record and from what

has taken place in his presence and hearing in the proceedings in this case.

.....

Sworn and subscribed to before me this.....day of February, 1927.

.....

Notary Public.

I hereby certify that I have examined the foregoing petition and that in my opinion the petition is well founded and that the case is one in which the prayer of the petitioner should be granted by this Court.

Dated at Pittsburgh, Pennsylvania, this.....day of March, 1927.

.....

Counsel for Petitioner.

Statement of the Case.

The petitioner, Daniel J. Shields, and a number of other persons, were indicted on an indictment containing five counts. The first count charged a conspiracy to violate the provisions of Section 3 of Title II. of the Act of October 28, 1919, known as the National Prohibition Act. The other four counts charged violations of Sections 3, 21 and 25 of the National Prohibition Act.

On February 8, 1926, he entered a plea of not guilty and the case proceeded to trial. The trial of the case was completed on Friday, February 12, 1926, whereupon the jury retired to deliberate upon a verdict. On February

13, 1926, the jury sent a written communication to the trial judge in the form of a verdict as follows:

> "To the Honorable Court:
> Sir:
>
> We, the jury find the defendants, John G. Emmerling, Charles Lynch, not guilty on all counts, E. W. Hardison, J. E. Hunter and J. L. Simler guilty on all counts, Daniel J. Shields, Harry Widman, J. M. Gastman unable to agree.
>
> (Signed) E. B. MILLIGAN,
> *Foreman.*"

(Record, 26), and in reply thereto the trial judge sent the following written instruction to the jury.

> "Feb. 13, 1926.
>
> The jury will have to find also whether Shields, Widman and Gastman are guilty or not guilty.
>
> F. P. SCHOONMAKER,
> *Judge.*"

(Record, 26.) That the foregoing instruction was requested and given in the absence of and without the knowledge of Daniel J. Shields, defendant, and his counsel (Record, 55 and 57).

That no knowledge came to the defendant or his counsel of the presentation of said tentative verdict and the written instructions given by the Court in reply thereto until the 21st day of April, 1926, and on the 22nd day of April, 1926, the same were filed (Record, 26). Thereupon, the defendant, Shields, presented his petition to the Court, setting forth the facts and asking the Court to grant an exception (Record, 54 and 55).

On the third of May, 1926, the Court issued an order refusing to grant an exception, assigning as his reason

for refusing an exception "that counsel for the defendant, Daniel J. Shields, requested the Court to hold the jury in deliberation until they should agree upon a verdict." The Court granted an exception to the order refusing the exception requested (Record, 57).

The trial Court, by an order entered on the argument list and without filing an opinion, denied the motion for a new trial (Record, 7), an exception was noted and a bill sealed to that order. The written instructions given to the jury by the Court on February 13 in the absence of and without the knowledge of the defendant and his counsel and the Court's refusal to seal a bill of exception were assigned as error in the Third and Fourth Assignments of Error (Record, 67, 68, 69, 70 and 71).

In the Circuit Court of Appeals for the Third Circuit the case was argued on the 10th day of November, 1926, and on the 11th day of January, 1927, the Court rendered its opinion, affirming the judgment of the District Court, wherein it asserts that the defendant's rights had been waived or forfeited by the conduct of his counsel. The only thing in the record indicating the conduct and the request of counsel referred to is contained in the order of the District Court of May 3, 1926, refusing to grant an exception to the additional written instructions sent by the trial judge to the jury on February 13, 1926, and in that order the Court assigned as its reason for such refusal "that counsel for the defendant, Daniel J. Shields, requested the Court to hold the jury in deliberation until they should agree upon a verdict, and therefore when the Court received the communication from the jury it was returned with the instructions complained of, although it is true that the defendant's counsel was not present when the communication was handed to the Court from the jury." The record does not contain any such request from defendant's counsel, the only evidence of

such request being the conclusion of the trial Court above quoted.

Upon the filing of the opinion of the Circuit Court of Appeals for the Third Circuit, a petition was presented for rehearing, in which all of the facts are set forth (R. 84-99), together with correspondence between defendant's present counsel and the trial judge (Record 92 to 99). That petition and the statement of the trial judge establish the following facts:

The jury, after trial, argument and charge, retired for deliberation on Friday afternoon, February 12, 1926. The jury remained in deliberation all night, and on Saturday morning, February 13, 1926, just before the convening of court, and a few minutes before 10 o'clock, Percy Allen Rose, counsel for your petitioner, and Assistant United States Attorney Richardson, went to the chambers of the trial judge before he had gone upon the bench and they both requested that the jury be held in deliberation until they should agree upon a verdict. Daniel J. Shields, the defendant and petitioner, was not present at the time this request was made and no one was present but the trial judge, Richardson and Rose. At the time this suggestion and request was made the jury had not been brought into Court for additional instructions. The trial judge cannot now recall the exact language used either by Mr. Rose or Mr. Richardson in requesting that the jury be held in further deliberation until they should agree upon a verdict. At about 10 o'clock the same morning (Saturday, February 13, 1926), the jury came into Court for further instructions on the question of entrapment, the additional instructions given by the Court at that time not being stenographically reported. After the jury had retired again they deliberated further until 2:30 o'clock on Saturday afternoon, February 13, 1926, when they returned to the Court in the absence of the

defendant and his counsel and advised the Court that they were unable to agree. There is no stenographic or other record as to what was said or just what occurred. Thereupon the jury returned for further deliberation and between 4:30 and 5:00 o'clock that afternoon the jury sent to the Court at chambers the following written communication:

"To the Honorable Court,
Sir:

We, the jury find the defendants, John G. Emmerling, Charles Lynch, not guilty on all counts, E. W. Hardison, J. E. Hunter and J. L. Simler guilty on all counts, Daniel J. Shields, Harry Widman, J. M. Gastman unable to agree.

(Signed) E. B. MILLIGAN,
Foreman."

and that upon the receipt thereof the trial Court replied in writing, in the absence of and without the knowledge of the accused and his counsel, the following instructon:

"Feb. 13, 1926.

The jury will have to find also whether Shields, Widman and Gastman are guilty or not guilty.

F. P. SCHOONMAKER,
Judge."

About a half hour later the verdict complained of was returned by the jury, wherein your petitioner was found guilty on the first count of the indictment and recommended to the mercy of the Court. A verdict of not guilty was returned on the second, third and fourth counts.

The petition for a rehearing having been denied, the petition to this Court for a certiorari to the United States Circuit Court of Appeals for the Third Circuit is presented.

Assignments of Error to be Urged.

The third and fourth assignments of error are urged upon the attention of the Court and they are as follows:

"ASSIGNMENTS OF ERROR.

Filed June 12, 1926.

And now, June 12th, 1926, comes Daniel J. Shields, the above named defendant, and files herewith his petition for a writ of error to the Circuit Court of Appeals of the United States for the Third Circuit thereof, and says that there are errors in the record and proceedings of the above entitled case and for the purpose of having the same reviewed in the said Circuit Court of Appeals assigns the following errors:

* * * * * * * *

Third. The jury having deliberated for several hours and having reported to the Court its proposed finding or verdict, as follows:

'To the Honorable Court,

Sir:

We, the jury find the defendants, John G. Emmerling, Charles Lynch, not guilty on all counts. E. W. Hardison, J. E. Hunter and J. L. Simler guilty on all counts. Daniel J. Shields, Harry Widman, J. M. Gastman unable to agree.

(Signed) E. B. MILLIGAN,
Foreman.'

The Court erred in further instructing the jury in writing as follows, to wit:

'Feb. 13, 1926.

The jury will have to find also whether Shields, Widman and Gastman are guilty or not guilty.

F. P. SCHOONMAKER,
Judge.'

Four. The Court erred in refusing to grant the prayer of the petition of the defendant, Daniel J. Shields, for an exception to the written instructions to the jury in the absence of the said defendant or his counsel, after they had deliberated for several hours and returned to the court room for further instructions, that they would have to find whether or not the defendants, Shields, Widman and Gastman were guilty or not guilty, which petition and order of the Court thereon are as follows:

'The petition of Daniel J. Shields respectfully represents:

1. That he is one of the defendants in the above stated case.

2. That in the trial thereof he was represented by Percy Allen Rose and Charles E. Copeland as attorneys.

3. That after the said case was submitted to the jury it retired and deliberated for several hours.

4. That during the course of the jury's deliberation it submitted to the court the following tentative verdict and asked for instruction from the court thereon, to wit:

"To the Honorable Court,
Sir:

We, the jury find the defendants, John G. Emmerling, Charles Lynch, not guilty on all counts; E. W. Hardison, J. E. Hunter and J. L. Simler guilty on all counts; Daniel J. Shields, Harry Widman, J. M. Gastman unable to agree.

(Signed) E. B. MILLIGAN,
Foreman."

5. That in response to the jury's request for further instructions the trial judge instructed them further in writing as follows:

"Feb. 13, 1926.

The jury will have to find also whether Shields, Widman and Gastman are guilty or not guilty.

F. P. SCHOONMAKER,
Judge."

6. That neither your petitioner, the said defendant, nor either of his attorneys was present in court at the time of the submission of the said tentative verdict and the said additional instructions in writing by the court.

7. That neither your petitioner, the said defendant, nor either of his attorneys had any knowledge or notice at the time of the submission of the said tentative verdict and the said additional instructions in writing by the court.

8. That neither the petitioners, the said defendants, nor either of his attorneys had notice of the submission of the said tentative verdict and the said additional instructions in writing by the court until the 21st day of April, 1926.

9. That if your petitioner, the said defendant, or either of his attorneys had received notice of the submission of the said tentative verdict and the said additional instructions in writing by the court objection would have been urged to the said additional instructions by your petitioner's said attorneys.

10. That under the act of June 1, 1872, C. 225, Section 10, Sec. 1702 Judicial Code (R. S. Sec. 1026), U. S. Compiled Statutes 1916, Vol.

3, page 3560, the jury was permitted to find some of the co-defendants with your petitioner guilty, others not guilty and disagree as to others of the said defendants.'

Your petitioner, therefore, respectfully prays the Court to grant and note him an exception to the said additional instructions in writing by the Court to the said jury.

DANIEL J. SHIELDS.

State of Pennsylvania,
County of Cambria. } *ss:*

On the first day of May, A. D. 1926, before me, the subscriber, a notary public in and for said county, personally came Daniel J. Shields, the above named petitioner, who, being by me duly sworn according to law, did depose and say that the matters set forth in the above and foregoing petition are true and correct.

DANIEL J. SHIELDS.

Sworn and subscribed to before me the day and year aforesaid, as witness my hand and notarial seal.

DULCIE G. GATES,
[SEAL] *Notary Public.*

My commission expires January 20, 1930.

ORDER.

And now, May 3rd, A. D. 1926, the above and foregoing petition read and considered and the prayer thereof is hereby refused and the court refuses to grant the said defendant, Daniel J. Shields, an exception to

the said additional instructions in writing by the court to the said jury, to wit:

"'Feb. 13, 1926.

The jury will have to find also whether Shields, Widman and Gastman are guilty or not guilty.

F. P. SCHOONMAKER,
Judge.'

for the reasons that counsel for the defendant, Daniel J. Shields, requested the Court to hold the jury in deliberation until they should agree upon a verdict and therefore when the court received the communication from the jury it was returned with the instructions complained of although it is true that the defendant's counsel was not present when the communication was handed to the court from the jury.

PER CURIAM,
S."

Argument and Brief on Petition for Rehearing.

The appellant is charged with a violation of Section 37 of the Criminal Code, and the offense charged is a felony (Crim. Code Sec. 335).

It is respectfully submitted that the Circuit Court of Appeals, in considering and disposing of the third and fourth Assignments of Error, attached unwarranted importance to the conclusion arrived at by the Trial Court. The original record contained none of the facts which were the basis of the Trial Court's conclusions, and the impropriety of the Court reaching conclusions and determining issues from occurrences and statements outside of and forming no part of the record, must be apparent.

After the Circuit Court of Appeals based its judgment entirely upon a finding or conclusion of the Trial Court in the absence of any facts in the record to support it, the petitioner presented his petition for a rehearing and in connection with that petition secured from the Trial Court a statement of the facts, and consequently the record now discloses, as fully as it has been possible to ascertain them, the facts, circumstances and conditions surrounding the occurrences upon which the conclusion of the Trial Court was based. These facts are presented in the correspondence between appellant's counsel and the Trial Court, and attached to the petition for rehearing in the Circuit Court of Appeals (R. 96 to 99).

The conclusions of the Court as to what occurred appear only in the Order of the Trial Court of May 3, 1926 (Record, page 71), which reads as follows:

> "And now, May 3rd, A. D. 1926, the above and foregoing petition read and considered and the prayer

thereof is hereby refused and the court refuses to grant the said defendant, Daniel J. Shields, an exception to the said additional instructions in writing by the court to the said jury, to wit:

'Feb. 13, 1926.

The jury will have to find also whether Shields, Widman and Gastman are guilty or not guilty.

F. P. SCHOONMAKER,
Judge.'

for the reasons that counsel for the defendant, Daniel J. Shields, requested the Court to hold the jury in deliberation until they should agree upon a verdict and therefore when the court received the communication from the jury it was returned with the instructions complained of, although it is true that the defendant's counsel was not present when the communication was handed to the court from the jury.

PER CURIAM,
S."

The Circuit Court of Appeals apparently assumed that the request referred to was made in open Court and with the knowledge and consent, or at least without the objection of the appellant.

The fact is that the request of defendant's counsel referred to was not made in Court, nor in the presence of the defendant. It was made in a private conversation in the chambers of the Trial Court. It did not get into the record of the case nor came to the attention of the defendant.

On Saturday Morning, February 13, shortly after the request was made, the jury, which had deliberated all

night, returned for further instructions on the question of entrapment. These additional instructions were given by the Court and the Court sent the jury out for further deliberation. The jury continued to deliberate until 2:30 o'clock in the afternoon, when they returned to the Court in the absence of the defendant and his counsel, and advised the Court that they were unable to agree. There is no record as to the instructions given to them at this time by the Court. It was at this time discretionary with the Court whether the time had arrived when the jury should be discharged as unable to agree, or whether they should be sent back for further deliberation under proper instructions. No error is assigned in connection with this occurrence.

The jury remained in deliberation until between 4:30 and 5:00 o'clock Saturday afternoon, at which time they sent a written communication in the form of a verdict to the Court (page 26 of Record) as follows:

"To the Honorable Court:
Sir:

We, the jury, find the defendants John G. Emmerling, Charles Lynch not guilty on all counts. E. W. Hardison, J. E. Hunter and J. L. Simler guilty on all counts. Daniel J. Shields, Harry Widman, J. M. Gastman unable to agree.

(Signed) E. B. MILLIGAN,
Foreman."

Neither the defendant nor his counsel were present or had knowledge of this communication. The Court immediately sent to the jury room the following written instruction, which is assigned as error in this case:

"Feb. 13, 1926.

The jury will have to find also whether Shields, Widman and Gastman are guilty or not guilty.

F. P. SCHOONMAKER,
Judge."

Had the Court at this time called the jury in and instructed them on the desirability of agreeing on a verdict of guilty or not guilty, and have given proper instructions, an entirely different question would be involved than the one which is here presented.

The Court, when it sent a written instruction, without the knowledge of the defendant or his counsel to the jury that they would *"have to find"* whether the appellant was guilty or not guilty,

(a) Disregarded the positive provisions of Section 1036 of the Revised Statutes, Sect. 1702, Judicial Code U. S. Compiled Statutes, 1916, Vol. 3, page 3560, which provides as follows:

> "On an indictment against several, if the jury cannot agree upon a verdict as to all, they may render a verdict as to those in regard to whom they do agree, on which a judgment shall be entered accordingly; and the cause as to the other defendants may be tried by another jury",

and

(b) Coerced the jury, which, by its reports to the Court, was shown to be reluctant to agree upon a verdict, and

(c) Refused to accept a perfectly good and valid form of verdict already submitted, and

(d) Coerced the jury into returning a compromise verdict, finding the defendant not guilty on the second, third and fourth counts, but guilty on the first count, and recommending him to the mercy of the Court.

It is further contended that it was error for the Court to communicate with the jury while it was in deliberation, regardless of the form of the instructions, in the absence of the defendant and his counsel, and an abuse of judicial power to refuse an exception to the defendant when it was asked for as soon as knowledge of the written instruction came to him.

In this connection, it is suggested also, and it is submitted that the Court should take judicial notice thereof, that it has never, within recent years, been the custom for the United States Disrict Court for the Western District of Pennsylvania to be in session on Saturday afternoons, and that the definitely established adjourning time of that Court, even on the days when afternoon sessions are held, is 4 o'clock P. M., and there can therefore, be no proper presumption, in view of the recorded facts to the contrary, that the accused was, or should have been, present.

I.

IT WAS ERROR FOR THE COURT TO COMMUNICATE WITH THE JURY IN THE ABSENCE OF APPELLANT AND HIS COUNSEL.

On this question the rule is the same in both criminal and civil trials.

The judgment of the Circuit Court of Appeals is in direct conflict with the decision of this Court in *Fillippon v. Albion Vein State Company*, 250 U. S. 76, 63 Law Ed. 853.

That case was considered by the Supreme Court of the United States on a *certiorari* to the United States Circuit Court of Appeals for the third circuit, to review a judgment which affirmed a judgment of the District Court for the Eastern District of Pennsylvania, in a civil case in which the jury, after retiring, sent to the judge a written inquiry, to which the trial judge replied in writing, in the absence of the parties and their counsel, without their consent and without calling the jury in open court. The Supreme Court of the United States, in an opinion delivered by Mr. Justice Pitney, says:

> "We entertain no doubt that the orderly conduct of a trial by jury, essential to the proper protection of the right to be heard, entitles the parties who attend for the purpose to be present in person or by counsel at all proceedings from the time the jury is impanelled until it is discharged after rendering the verdict. Where a jury has retired to consider of their verdict, and supplementary instructions are required, either because asked for by the jury or for other reasons, they ought to be given either in the

presence of counsel or after notice and an opportunity to be present; and written instructions ought not to be sent to the jury without notice to counsel and an opportunity to object. Under ordinary circumstances, and wherever practicable, the jury ought to be recalled to the court room, where counsel are entitled to anticipate, and bound to presume, in the absence of notice to the contrary, that all proceedings in the trial will be had. In this case the trial court erred in giving a supplementary instruction to the jury in the absence of the parties and without affording them an opportunity either to be present or to make timely objection to the instruction. See *Stewart v. Wyoming Cattle Ranch Co.*, 128 U. S. 383, 390, 32 L. Ed. 439, 442, 9 Sup. Ct. Rep. 101; *Aerhart v. St. Louis, I. M. & S. R. Co.* 40 C. C. A. 171, 99 Fed. 907, 910; *Yates v. Whyel Coke Co.*, 137 C. C. A. 327, 221 Fed. 603, 608; and many decisions of the state courts collated in 17 L. R. A. (N. S.) 609, note to *State of North Dakota v. Murphy*, 17 N. D. 48, 115 N. W. 84, 16 Ann. Cas. 1133.

The circuit court of appeals considered that the jury had asked a plain question in writing concerning a matter of law, and the judge had answered it in writing plainly and accurately, and were of the opinion that since nothing else had occurred,—the question and answer having been preserved of record and counsel having been promptly notified of what had taken place, and given the opportunity of excepting to the substance of the instruction and to the manner of giving it,—no harm had been done, and none was probable to arise under like circumstances, and hence affirmed the judgment.

It is not correct, however, to regard the oppor-

tunity of afterwards excepting to the instruction and to the manner of giving it as equivalent to an opportunity to be present during the proceedings. To so hold would be to overlook the primary and essential function of an exception, which is to direct the mind of the trial judge to the point in which it is supposed that he has erred in law, so that he may consider it and change his ruling if convinced of error, and that injustice and mistrials due to inadvertent errors may thus be obviated. *United States v. United States Fidelity & G. Co.* 236 U. S. 512, 529, 59 L. ed. 696, 704, 35 Sup. Ct. Rep. 298; *Guerini Stone Co. v. Carlin Constr. Co.*, 248 U. S. 334, 348, 39 Sup. Ct. Rep. 102."

That any communication between the judge and jury after they have retired to deliberate upon the verdict, except in open court, is improper, is well established. *Sargent v. Roberts*, 1 Pick. 337, 11 Am. Dec. 185, is a leading case upon this question, and has been extensively followed by the courts of other states. In that case, after the jury had been out six hours, the foreman wrote to the judge that they could not agree, and awaited his directions. The judge returned a written answer saying he was unwilling that they should separate, and giving them such directions as would enable them to reconsider the case in a more systematic manner, and directing that the communication be returned into court. After this a verdict was reached in favor of defendants. The court held that, while no complaint could be made as to the substance of the communication, a new trial should be granted because there should be no communication whatever between the judge and jury except in open court, and, when practicable, in the presence of counsel.

In the following cases it was held to be error for the court to send additional instructions to the jury room without the consent of, or notice to, parties or counsel: *Sommer v. Huber,* 183 Pa. 162, 38 Atl. 595; *Read v. Cambridge,* 124 Mass. 567, 26 Am. Rep. 690 (though answer to jury admitted to be correct); *Chicago & A. R. Co. v. Robbins,* 159 Ill. 598, 43 N. E. 332; *Taylor v. State,* 42 Tex. 504; *Quinn v. State,* 130 Ind. 340, 30 N. E. 300 (instruction merely as to return of verdict); *Fish v. Smith,* 12 Ind. 563; *Fox v. Peninsular White Lead & Color Works,* 84 Mich. 676, 48 N. W. 203; *Hall v. State,* 8 Ind. 439 (withdrawing two erroneous instructions); *State v. Patterson,* 45 Vt. 308, 12 Am. Rep. 200 (answering question as to manslaughter and sending jury statute on the point; both actions error); *Norton v. Dorsey,* 65 Mo. 376 (jury called back to court room, but all others excluded except deputy sheriff); *Smith v. McMillen,* 19 Ind. 391 (sending written instructions, given orally at the trial).

It was also held to be error for the judge to answer questions sent by the jury without the consent of counsel, without regard to the nature of the communication, in *O'Connor v. Guthrie,* 11 Iowa, 80; *Johnson v. State,* 100 Ala. 55, 14 So. 627; *Hopkins v. Bishop,* 91 Mich. 328, 30 Am. St. Rep. 480, 51 N. W. 902; *State v. Alexander,* 66 Mo. 148 (answering written question sent by juror, and also holding conversation with juror about possibility of agreement); *Goode v. Campbell,* 14 Bush, 75; *Low v. Freeman,* 117 Ind. 341, 20 N. E. 242 (improper, though answer given was correct); *Kehrley v. Shafer,* 92 Hun., 196, 36 N. Y. Supp. 510 (giving amount of plaintiff's claim); *Chouteau v. Jupiter Iron Works,* 94 Mo. 388, 7 S. W. 467; *Bunn v. Crowl,* 10 Johns, 239; *Neil v. Abel,* 24 Wend. 185 (justice sent minutes of trial to the jury at their request). In *Coolman v. State,* 163 Ind. 503, 72 N. E. 568 (in which

the judge, in effect, told the jury that a verdict of disagreement could not be received); and in *State v. Kiefer,* 16 S. D. 180, 91 N. W. 1117, and *McBean v. State,* 83 Wis. 206, 53 N. W. 497 (in which the judge, in effect, informed the jury that he would consider a recommendation of mercy), it was held that no communication should be had, though the answers themselves in these cases were doubtless prejudicial. The same result was reached in *Ruckersville Bank v. Hemphill,* 7 Ga. 396; *State v. Frisby,* 19 La. Ann. 143; and *Chinn v. Davis,* 21 Mo. App. 363,—when a juror left the jury room and held some conversation with the judge.

A number of cases have arisen in which the judge has entered the jury room, in which such conduct has been held reversible error.

Thus, in *Hurst v. Webster Mfg. Co.,* 128 Wis. 342, 107 N. W. 666, the jury, after deliberating some time, sent a request to have the pleadings and papers in the case. The judge went to the jury room, and, standing in the doorway, told them he could not grant the request, but did inform them as to some undisputed figures and amounts. The court, speaking of the rule that no communication should be had between judge and jury after submission of the case, except in open court, says:

> "All court proceedings should be in the open; there should be no opportunity for the doing of things in a corner, nor should a defeated party be required to show that such a communication as was here had was in fact prejudicial. He is entitled to have his case tried in open court from start to finish. There is safety in no other rule."

Similar results were reached in *Abbott v. Hockenberger,* 31 Misc. 587, 65 N. Y. Supp. 566, in which the

justice was asked if verdict would carry costs, and answered, "Yes;" *Hudson v. Stearns,* 75 N. Y. Supp. 735, in which the justice answered through the doorway that costs must follow the judgment; in *Benson v. Clark,* 1 Cow. 258, in which the justice went into the jury room, but did not answer the question asked, and, shortly after, sent a certain paper to the jury at their request, both acts being held reversible error; *Havenor v. State,* 125 Wis. 444, 104 N. W. 116, in which the judge stepped to the door of the jury room, and, being asked a question, told the jury he could not answer it, but that the point was covered by his charge; *Kirk v. State,* 14 Ohio 511, in which one of the associate judges, on request of the others, went to the jury room during adjournment and explained the charge to them, it being held that this violated the constitutional right to a public trial; *Ducate v. Brighton,* 133 Wis. 628, 114 N. W. 103 in which the judge went to the jury room, taking the stenographer to report all that was said, and announced that the sheriff would take them to supper, and cautioned them as to their conduct while at the meal; *High v. Chick,* 81 Hun., 100, 1 N. Y. Anno. Cas. 1, 30 N. Y. Supp. 652, in which the jury was left to deliberate in the trial room, and the court said the error could have been avoided by the justice announcing the court open and inviting the attorneys in; *Hoberg v. State,* 3 Minn. 262, Gil. 181, in which the judge merely informed the jury that they should come into open court if they wanted further instructions (see *Oswald v. Minneapolis & N. W. R. Co.,* 29 Minn. 5, 11 N. W. 112, and *Helmbrecht v. Helmbrecht,* 31 Minn. 504, 18 N. W. 449, for modifications of this case); *Gibbons v. Van Alstyne,* 29 N. Y. S. R. 461, 9 N. Y. Supp. 156, in which the justice entered the jury room, but nothing was shown as to there being any conversation with the jury; *Valen-*

tine v. Kelley, 54 Hun., 78, 26 N. Y. S. R. 481, 7 N. Y. Supp., 184, in which a justice merely suggested to the jury that they try to agree on a verdict, no partiality or coercion being shown; *Watertown Bank & Loan Co. v. Mix*, 51 N. Y. 558, in which, by direction of the judge, a written statement of the stenographer that a certain question was not asked, was sent to the jury room; *Crabtree v. Hagenbaugh*, 23 Ill. 349, 76 Am. Dec. 694, and *Stager v. Harrington*, 27 Kan. 414, in which it was held error for the judge to enter the jury room, and that in such cases the court will not inquire into the effect of such entry; *People v. Linzey*, 79 Hun, 23, 61 N. Y. S. R. 240, 29 N. Y. Supp. 560, in which the judge, in answer to a question by a juror as to what the charge was against the defendant, answered "petit larceny"; *Lester v. Hays*, 14 Tex. Civ. App. 643, 38 S. W. 52; *State v. Bland*, 9 Idaho, 796, 76 Pac. 780; *People v. Bowers*, 111 N. Y. Supp. 623, in which the judge answered the question as to the nature of the offense and punishment. In *Danes v. Pearson*, 6 Ind. App. 465, 33 N. E. 976, the court said: "An act, a sentence, or a word, from the presiding judge, may exert a controlling influence on the verdict. It is for these reasons that a communication by the judge to the jury stands on a different basis from that of another person, and, for a like reason, the law should throw a higher degree of circumspection around such communications."

In the case of *State of North Dakota v. Murphy*, a criminal case, in which the defendant was charged with forgery, 17 L. R. A. (N. S.) 619, the trial judge, at the request of the jury, went to the door of the jury room and addressed the jury as follows: "Good evening, gentlemen. I understand you want to see me. Have you agreed?" To which the foreman of the jury answered: "No. I think we cannot agree." Whereupon, the trial judge re-

plied: "I will ask you to consider the matter further. Good night." The appellate court thereupon declared:

> "As to the purity of the intentions of the judge in going into the jury room in this case, and there having the brief communication with the jury, no certificate or proof is necessary so far as this court is concerned, as it well knows that his uprightness and sincere desire to be absolutely just and fair in all cases are beyond question. That admitted fact, however, does not meet the question before us, which is: Did he do that which was beyond his judicial functions in respect to the case? We are forced to the conclusion that he did. His presence in the jury room for any kind of communication with the jury is not contemplated by any provision of the statute. The opposite is the plain inference from the statute. All communication to the jury in open court is subject to exception by the parties, if deemed improper. If any communication is made to them in the jury room in the absence of the parties, no opportunity is afforded for objections and exceptions at the time. The open court is the place for communications to the jury in the presence of, or on notice to, the attorneys. The jury room is for the jury alone, and no communications are allowed with them in the room except upon orders from the court through the officer in charge of them, who is permitted to ask them whether they have agreed upon a verdict. All communications to the jury in reference to the case should be made in open court, and all communications to them in the jury room avoided. In this way all distrust and fear that something improper is said or done will be without foundation, and every act be subject to exception and review. Any communication by word or writing not in open court affects the efficiency of jury trials

as a means of accomplishing justice after giving all parties full opportunity of being heard at all stages of the trial. A strict compliance with this practice of having all proceedings in court in the presence of counsel, or on notice to them, unless waived, is better than to countenance violations thereof unless prejudice is shown. The state urgently insists that no prejudice could have resulted from what was done or said in this case, but we shall not consider that question. However, the fact that the foreman said that he thought they could not agree when the judge first spoke to them, and that they did agree in five or ten minutes thereafter, would be a stubborn fact for consideration if we entered upon an inquiry as to the effect upon the jury of the words spoken to them and the visit to the room. We think that any communication in this way as to the case should be prohibited and held prejudicial. It is against the policy of the law to indulge in secret communications or conferences with the jury or with jurors in reference to the merits or law of the case. To determine in each case whether prejudice resulted would be difficult, if not impossible, and justice will be better subserved by avoiding such communications entirely. The authorities are practically unanimous in condemning such communications, and in holding them prejudicial as a matter of law."

It is therefore respectfully submitted that it was error for the trial judge to communicate with the jury in this case in the absence of and without the knowledge of the appellant and his counsel, regardless of the nature of the instruction given.

And it is further submitted that even were the Court to place the broadest possible construction upon the al-

leged request of counsel for the appellant, it could not be construed as a request or as constituting the consent of the appellant that the Court should or might disregard the requirement of the law that the Court may only instruct the jury in open Court and in the presence of, and with the knowledge of, the accused and his counsel.

II.

THE COURT'S WRITTEN INSTRUCTION ERRONEOUS.

There is no rule of law that requires or compels a jury to agree upon a verdict of guilty or not guilty, and the members of a jury can only vote for conviction after being convinced collectively and individually by the evidence of the guilt of the accused.

This jury did not *"have to find"* the appellant guilty or not guilty, and it was a violation of the duty of a jury to so do, if there was an honest difference of opinion between the individual jurors as to guilt or innocence. While it was prejudicial error, as hereinbefore shown, for the Court to communicate any instructions to the jury while deliberating, that error is greatly aggravated by the fact that the instructions thus erroneously communicated were erroneous and would have been so adjudicated if given in open Court in a regular and proper way.

Section 1036 of the Revised Statutes of the United States declares:

> "On an indictment against several, if the jury cannot agree upon a verdict as to all, they may render a verdict as to those in regard to whom they do agree, on which a judgment shall be entered accordingly; and the cause as to the other defendants may be tried by another jury."

This statute has been clearly interpreted by this court in the case of *Bucklin v. United States,* 159 U. S. 682 (16 Sup. Ct. Rep. 182) and the opinion of the Circuit Court of Appeals in the instant case is in direct conflict with the opinion of this Court in the Bucklin case. Mr. Justice Harlan, in delivering the opinion of the Court, said:

> "But there was error prejudicial to the accused in the instruction to the jury that while they might find a verdict of guilty as to all three defendants on trial, or find some guilty and some not guilty, they could not find a verdict as to some and disagree as to others.
>
> The learned assistant attorney general refers to Section 1036 of the Revised Statutes, providing that 'on an indictment against several, if the jury cannot agree upon a verdict as to all, they may render a verdict as to those in regard to whom they do agree, on which a judgment shall be entered accordingly; and the cause as to the other defendants may be tried by another jury.' He properly insists that that section is not in terms, applicable to separate indictments, tried together; but he frankly states that the instruction is so clearly erroneous as to suggest the possibility of a mistake in the bill of exceptions. * * *
>
> Take the record as disclosing all that occurred at the time the jury came into court for additional instructions, there was error in the ruling that the jury could not find a verdict as to some of the defendants, and disagree as to others. The jurors had been deliberating for three days without returning a verdict as to either of the defendants, when they were instructed that their duty was either to find each defendant not guilty or each guilty, or some guilty and the others not guilty. If some of the jurors wavered

in their minds as to the guilt of all the defendants,—and the delay in returning the verdict justifies the belief that such was the fact,—it may be that the instruction of which complaint is made worked injury to the plaintiff in error. We cannot say that it did not. To say that the court would not receive from the jury a report of a disagreement as to one defendant was, in effect, to announce that the jurors would be held together until the court should deem it to be its duty to discharge them finally, and would not be discharged unless or until they returned a verdict of guilty or not guilty. This tended to coerce the jury into making a verdict. The accused was entitled, of right, to go before a new jury if the one that tried him was unable to agree that he was guilty of the offense charged.

As it was competent for the jury to return a verdict of guilty or of not guilty as to the defendants, Thomas Bucklin and George Elder, and to report a disagreement as to Daniel A. Bucklin, the instruction complained of must be held to have been erroneous; and as this error may have injuriously affected the rights of the accused, the judgment is reversed, with directions to grant him a new trial."

The Bucklin case is a ruling case; and it not only clearly holds that an instruction such as was given in this case is erroneous, but also that it is sufficiently prejudicial to the defendant to require that a new trial be granted. The facts in that case are astonishingly similar to the facts in this case, because in that case the jury, after it had deliberated for some time, asked the Court if they could find a verdict as to some defendants and disagree as to others, and were told by the Court that they would have to find each defendant either guilty or not

guilty. In this case, just as in the Bucklin case, the Jury was instructed that they must find each defendant as to whom they had reported a disagreement, guilty or not guilty.

No reasonable construction that can be placed upon the so-called request of appellant's counsel to the trial court in his chambers, outside of the court room, and without the knowledge of the appellant, can be broad enough to justify the Court in giving an instruction in defiance of Revised Statutes, Section 1036.

It was beyond the power of the Court to reach an understanding with counsel for the accused and the Government, by which the Court was to ignore, disregard and set aside the positive provisions of an Act of Congress, and my unfaltering faith in the Trial Judge convinces me that the instruction complained of was written hastily, and that in the haste the Act of Congress was entirely overlooked. This conviction, which I believe is the only reasonable conclusion to draw from the state of this record, emphasizes anew the propriety of the rule of law hereinbefore referred to, which prohibits communications between the Trial Judge and a jury while the jury is deliberating in the absence of, and without the knowledge of, the defendant and his counsel. It is probable, in this case, that had the instruction complained of been given in open Court in the presence of the parties, the Act of Congress would have been called to the attention of the Court, when an exception was asked for, and that the error would thereupon have been corrected.

III.

THE INSTRUCTION COMPLAINED OF CONSTITUTES A COERCION OF THE JURY.

When the Trial Court instructed the jury that they *"have to find"* the appellant guilty or not guilty, he gave them an instruction, the only effect of which could be to coerce the jury into a verdict. The instruction would have been no more positive and forceful had it directed that the jury *must* find the appellant guilty or not guilty. While this instruction would have been erroneous and have constituted a coercion of the jury, if given at the time of and in connection with the general charge, yet its erroneous character and coercive effect is greatly accentuated when considered in connection with the facts in this case.

The jury had been deliberating for more than twenty-four hours. They had received additional instructions on the question of entrapment. More than two hours before the instruction complained of was given, they had returned to the Court and informed the Court that they were unable to agree as to the appellant, and the Court had thereupon sent them back under what we presume was proper instruction. Saturday night was fast approaching, and with an apparent abandonment of hope that a further agreement could be arrived at, they sent to the Court the written communication, which was in the form of a verdict. In this so-called tentative verdict, they found part of the defendants not guilty, part of them guilty, and declared their inability to agree as to the guilt or innocence of the appellant. Had they come into Court with this verdict, instead of merely sending it by a bailiff to the Court, it would have been such a verdict as the Court could, under the law, have properly accepted. Upon its receipt,

however, the Court, without explanation of any kind, sends them the written instruction assigned as error, telling the jury what they will *"have"* to do. In effect, it tells them that they *must* find the appellant guilty or not guilty. It was a mandatory direction, and the only logical deduction which the jury could draw from such a requirement was that the jury would remain locked up in deliberation until the requiremnet of a verdict of guilty or not guilty had been complied with. That the jury were reluctant to reach such a decision is apparent.

And it is further apparent from the verdict, which this instruction induced about a half hour later, that some of the members of that jury surrendered their convictions and opinions in order that the requirement of the Court might be met. The verdict justifies the conclusion that the Court's mandatory instructions drove the jury to a compromise, in order that they might be relieved of further consideration of the case, and in arriving at that compromise they eased their consciences by finding the appellant guilty on only one count and recommending him to the mercy of the Court.

On three counts they acquitted him. It is interesting to note in this connection that the indictment upon which the appellant was tried contained five counts. Yet the verdict, coerced, as we believe it was, by the instructions of the Court, and hastily arrived at during the falling shades of Saturday night, only disposes of four of the counts contained in the indictment, insofar as it relates to the appellant. This, in itself, is some indication of the care and the consideration which this divided jury gave to the compromise which they felt compelled, as the result of the Court's instruction, to arrive at.

The error which was held to constitute coercion in

the case of *Peterson v. United States,* 213 Fed. 920, is trifling as compared with the error assigned in the case at bar.

The Circuit Court of Appeals for the Eighth Circuit in the case of *Nigro v. United States,* 4 Fed. (2nd), 781 held that (syllabus):

> "After jury failed to agree, and court had told foreman that it would not ask him to say how jury stood, question asked him whether predominance of individual jurors was one way or the other, eliciting answer that there was predominance, held error.
>
> Where jury had deliberated for some time, supplemental instruction as to reaching agreement, consisting of abstract statement from opinion in another case, held erroneous, as forcibly urging deference by minority of jury to view of majority without properly calling attention to positive duty of each juror to form and make his verdict express his own honest conviction."

and the same Court, in *Edwards v. United States,* 7 Fed. (2nd) 598, held (syllabus):

> "Where jury had deliberated after submission of the case for 24 hours, and, being brought into court, reported their inability to agree, and that they had made no substantial progress, and court thereupon asked foreman whether point in dispute was a matter of law, and foreman replied, 'I don't think it is,' act of court in proceeding as though it were a matter of law caused the disagreement, and again summing up and charging jury on the controlling points in the case in language that was not free from argument, and concluding with language which was at least in some degree calculated to coerce a verdict, constituted reversible error."

IV.

DUE PROCESS OF LAW DENIED APPELLANT.

The Constitution guarantees to the appellant the right to be tried by the law of the land. He was, therefore, entitled to be present at every stage of the proceeding, and especially at all times when the Court was giving instructions to the jury charged with the trial of the case against him. He was also entitled to the benefit of the provisions of Section 1036 of the Revised Statutes, which regulated and prescribed the power and the right of the jury trying the case.

It is undisputed in this case that he was deprived of the opportunity and the right of being present when the Court instructed the jury that they would *"have to find"* the appellant guilty or not guilty. It might be contended, had this instruction been given in open Court, and during the usual court hours, that he had not been denied that opportunity. In this case, however, the instructions were privately communicated in writing from the Court's chambers. The defendant had neither right nor opportunity to be present; neither had his counsel. No notice of the jury's request or the Court's contemplated reply was communicated to either the defendant or his counsel, nor was any attempt made so to do. The effect of this proceeding during the trial of the case deprived the appellant of his fundamental right to due process of law.

Revised Statutes, Section 1036, was enacted to secure to a defendant a fundamental right, as well as to secure to the jurors an opportunity to perform their duties with a conscientious adherence to the oaths which they take. The

instructions of the Court completely ignored and repudiated the fundamental right which this Act of Congress accorded to the appellant, and in consequence the appellant was deprived of a trial by the law of the land.

The Circuit Court of Appeals has suggested, in its Opinion, that the so-called request of appellant's counsel, made in chambers, without his knowledge and consent, seven or more hours prior to the occurrences and the giving of the instructions complained of, operated as a waiver of all of the defendant's rights to complain of the errors hereinbefore recited. It will not be suggested that the request of counsel, in whatever words it may have been couched, was ever intended to go further than the Court could properly go under the law. It would be a startling reflection, not only upon appellant's counsel and the Government's counsel, but upon the Court as well, to even infer that the counsel suggested and that the Court acquiesced in the suggestion that:

(1) The Court should communicate with the jury in the absence of appellant and his counsel, without calling the jury into Court.

(2) That the Court should instruct the jury, in effect, to disregard Section 1036 of the Revised Statutes.

(3) That the jury should be coerced into rendering a verdict which they were reluctant to return.

V.

THE RIGHT TO DUE PROCESS CANNOT BE WAIVED.

It is further respectfully submitted that a request made by a defendant's counsel, not in the presence of the defendant, and not in open Court, during some stage of the judicial proceeding, cannot constitute a waiver of the constitutional right of a defendant to a trial by due process of the law.

In the case of *Prine v. The Commonwealth*, 18 Pa. 103, the Supreme Court of the Commonwealth of Pennsylvania held that the right of a prisoner indicted for felony to be present in court at his trial is inherent and inalienable, and that in the case of an indictment for burglary and larceny, it appearing from the record that the presence of the prisoners in court at the rendition of the verdict was waived by their counsel, the judgment was reversed, and the short but persuasive opinion of Chief Justice Gibson is as follows:

> "It is undoubtedly error to try a person for felony in his absence, even with his consent. It would be contrary to the dictates of humanity to let him waive the advantage which a view of his sad plight might give him by inclining the hearts of the jurors to listen to his defense with indulgence. Never has there heretofore been a prisoner tried for felony in his absence. No precedent can be found in which his presence is not a postulate of every part of the record. He is arranged at the bar; he pleads in person at the bar; and if he is convicted, he is asked at the bar what he has to say why judgment should not be pronounced against him. These things are matter of substance, and not peculiar to trials for murder; they belong to every trial for felony at the common law, because the mitigation of

the punishment does not change the character of the crime. How could the Court record them as facts, if the truth were not so? Our looseness in recording forms of procedure, especially in criminal cases—if we have any forms left—has grown till the knowledge of the principles of which they were the exponents, has been lost to the bench and the bar. More method sometimes appears in the record of a justice's judgment for a few dollars, than appears in the record for a conviction of murder. These irregularities strike our professional neighbors with special wonder. They have overborne resistance by force of numbers; but we have not yielded to them in the one case capital of our law. In a conviction of murder, we have required the substantive parts of a proper record to be set out so clearly as to be separable from the dross with which it is usually blended. This was in *favorem vitae*. In other felonies, it is allowable to presume that everything was rightly done till the contrary appear; but when it is stated on the record positively that the prisoner was not present, we cannot shut our eyes to the fact. What authority had the prisoner's counsel in this instance, on the pretext of convenience, to waive their presence? In a criminal case, there is no warrant of attorney, actual or potential; for when a prisoner binds himself by an agreement which he is competent to make, it is entered on the record as his immediate act; and this is a sufficient reason why he should be in Court to do those things which his counsel could not do for him. It is unnecessary, however, to speak of delegated authority; for the right of a prisoner to be present at his trial is inherent and inalienable. The record before us, therefore, is erroneous; but we direct that the prisoners be held to answer a fresh indictment."

It has been held in a number of cases that even the defendant himself cannot waive his right to due process, and in support of this proposition the Court's attention is invited to the Opinion of this Court in the case of *Hopt v. People of the Territory of Utah*, 110 U. S. 574, 4 Supreme Court Reporter 202, wherein that Court says:

> "But it is said that the right of the accused to be present before the triers was waived by his failure to object to their retirement from the court room, or to their trial of the several challenges in his absence. We are of opinion that it was not within the power of the accused or his counsel to dispense with statutory requirement as to his personal presence at the trial. The argument to the contrary necessarily proceeds upon the ground that he alone is concerned as to the mode by which he may be deprived of his life or liberty, and that the chief object of the prosecution is to punish him for the crime charged. But this is a mistaken view as well of the relations which the accused holds to the public as of the end of human punishment. The natural life, says Blackstone, 'cannot legally be disposed of or destroyed by any individual, neither by the person himself, nor by any other of his fellow creatures merely upon their own authority.' 1 Bl. Comm. 133. The public has an interest in his life and liberty. Neither can be lawfully taken except in the mode prescribed by law. That which the law makes essential in proceedings involving the deprivation of life or liberty cannot be dispensed with, or affected by the consent of the accused, much less by his mere failure, when on trial and in custody, to object to unauthorized methods. The great end of punishment is not the expiation or atonement of the offense of the same kind. 4 Bl. Comm. 11. Such being the relation which the citizen holds to the public, and

the object of punishment for public wrongs, the legislature has deemed it essential to the protection of one whose life or liberty is involved in a prosecution for felony that he shall be personally present at the trial; that is, at every stage of the trial when his substantial rights may be affected by the proceedings against him. If he be deprived of his life or liberty without being so present, such deprivation would be without that due process of law required by the constitution."

And again, in the case of *Thompson v. The State of Utah*, 170 U. S. 343, 18 Supreme Court Reporter 620, the Court, after quoting from its opinion in *Hopt v. Utah*, says:

> "If one under trial for a felony the punishment of which is confinement in a penitentiary could not legally consent that the trial proceed in his absence, still less could he assent to be deprived of his liberty by a tribunal not authorized by law to determine his guilt."

VI.

The only authority cited by the Circuit Court of Appeals in justification of its judgment is 17 C. J., sec. 3724, as follows:

> "A defendant in a criminal case cannot complain of error which he himself has invited."

In answer to this authority, it is denied that any of the errors complained of in this case were invited by the appellant. The text hereinbefore cited is supported by no note, citation or authority justifying its application to the facts and the law in the case at bar. Neither the appellant nor his counsel requested the instruction which the Court gave to the jury, that they would *"have"* to find the appellant guilty or not guilty. Neither the defendant nor his

counsel requested or invited the Court to communicate with the jury without the knowledge and presence of the appellant. Neither the appellant nor his counsel requested or invited the Court to communicate with the jury other than in open Court. Neither the defendant nor his counsel requested or invited the Court to coerce the jury into a verdict which they were reluctant to return.

A review of the authorities cited to sustain the text hereinbefore quoted will disclose that every one of them relates either to a ruling requested by the defendant or to a ruling which was more favorable to the defendant than the defendant was, under the law, entitled to. As to the purported request itself, whatever its form and wording may have been, it must be considered in the light of conditions existing at the time it was made. It could not be recognized as a progressive thing, growing to meet new conditions and intended to apply to new and unforseen situations. So, too, it must be presumed to have been, at most, a request that the Court do a lawful thing, and consequently it must be recognized as nothing more than an appeal to the discretionary power of the Court. If the error assigned in this case were an alleged abuse of discretion on the part of the Court, the request of the parties as to the manner in which that discretion should be exercised could be properly considered in this case. In the case at bar, however, the Court, after exercising its discretion by keeping the jury in deliberation until late on Saturday afternoon, committed the errors complained of, which involve not an abuse of discretion, but the positive and affirmative denial of the fundamental rights of the appellant, and by the denial of these rights coerced the jury into rendering the verdict complained of.

VII.

The Circuit Court of Appeals, in referring to the questions herein pressed, says:

> "It remains to consider one matter which is not assigned for error but which is urged upon us by counsel as a plain error apparent on the face of the record. As Rule 11 of this Court provides: 'The Court, at its option, however, may notice a plain error not assigned', we have the power to consider such error though not assigned. But after careful consideration we find no error in the Court's action."

While the Court undertakes to adjudicate the questions involved under the third and fourth Assignments of Error in conformity with the provisions of its rules, yet apparently it labored under a misapprehension as to the state of the record.

The instruction complained of was, insofar as the defendant and his counsel were concerned, a secret instruction of which they had no knowledge until weeks later, and just as soon as it came to their attention the defendant presented his petition (R. 54, 55), setting forth the facts and praying for an exception to said additional instructions. This exception the Court refused (R. 56)). The Court did, however, seal a bill of exceptions (R. 57) to its refusal to grant an exception to the additional instructions so as aforesaid secretly given to the jury.

The third and fourth Assignments cover the entire transaction. The situation with reference to exceptions only serves to emphasize the error of the Court. No defendant can be secure in his rights if a trial court is to be permitted to give instructions to a jury outside of open

Court and without the knowledge of the defendant and his counsel, and thereafter, when such instructions come to the attention of the defendant, be permitted to refuse an exception, and by so doing defeat the defendant's right to a review in an appellate court. To merely state the proposition is to condemn such a practice.

Wherefore, it is respectfully submitted that the Circuit Court of Appeals for the Third Circuit should have reversed the judgment complained of, and that by reason of the error of said Court the prayer of the petitioner for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit should be granted, to the end that said case may be reviewed and determined by this Court.

E. Lowry Humes,
Attorney for Petitioner,

1209 First National Bank Building,
Pittsburgh, Pennsylvania.

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In the Supreme Court of the United States

OCTOBER TERM, 1926

No. 944

DANIEL J. SHIELDS, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES

OPINIONS BELOW

No opinion was rendered by the District Court. The opinion of the Circuit Court of Appeals (R. 75) has not been reported.

JURISDICTION

The judgment sought to be reviewed was entered January 11, 1927 (R. 84), and rehearing denied February 14, 1927 (R. 100). The petition for a writ of certiorari was filed February 28, 1927. Jurisdiction to issue the writ is conferred upon this Court by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936.

STATEMENT

Petitioner was tried with others upon an indictment charging conspiracy to violate, as well as various violations of, the National Prohibition Act. (R. 10–23.) The case was submitted to the jury on Friday afternoon, February 12, 1926. Before the court convened on Saturday morning, February 13, 1926, the jury still being out, counsel for the defendants and the Assistant United States Attorney in charge of the prosecution visited the trial judge in chambers and requested that the jury be held in deliberation until they should agree upon a verdict. (R. 98–99.) Shortly after the opening of court at 10.00 o'clock that morning, the jury returned for additional instructions on the subject of entrapment, and having received the same, retired for further deliberation. About 2.30 o'clock that afternoon the jury again returned to court, in the absence of petitioner and his counsel, and reported that they could not agree. (R. 96, 99.) What instructions, if any, were then given the jury the record does not disclose. It appears that the jury again retired to deliberate, and between 4.30 and 5.00 o'clock p. m. sent to the Judge in chambers the following written communication (R. 26, 54):

> We, the jury, find the defendants John G. Emmerling, Charles Lynch not guilty on all counts, E. W. Hardison, J. E. Hunter and J. L. Simler guilty on all counts. Daniel J.

Shields, Harry Widman, J. M. Gastman unable to agree.

Signed, E. B. MILLIGAN,
Foreman.

The Judge sent back the following written reply (R. 26, 54):

> The jury will have to find also whether Shields, Widman and Gastman are guilty or not guilty.
>
> F. P. SCHOONMAKER,
> *Judge.*

Shortly thereafter the jury returned the following verdict (R. 26):

> We, the jury find the defendants John G. Emmerling, Charles Lynch, not guilty on all counts. E. W. Hardison, J. L. Simler, J. E. Hunter guilty on all four counts. Daniel J. Shields, Harry Widman, J. M. Gastman guilty on first count and recommended to mercy of court. Not guilty on 2nd, 3rd and 4th counts, this 13th day of February, 1926.
>
> E. B. MILLIGAN,
> *Foreman.*

Upon this verdict the court rendered its judgment wherein the petitioner Shields was sentenced to pay a fine of $2,000 and to be imprisoned in jail for one year. (R. 65.) Shields thereafter filed in the court a petition alleging that until April 21, 1926, neither he nor his counsel had any knowledge of the tentative verdict sent by the jury to the Judge in chambers, or of the reply thereto by the Judge, and praying that he be allowed an exception

to the action of the Judge in sending said reply. (R. 54, 55.) The court refused to grant the petition for the reason, as stated by it (R. 57):

> * * * that counsel for the defendant, Daniel J. Shields, requested the court to hold the jury in deliberation until they should agree upon a verdict, and therefore when the court received the communication from the jury, it was returned with the instructions complained of, although it is true that the defendant's counsel was not present when the communication was handed to the court from the jury.
>
> (Sgd.) PER CURIAM
>
> S.

An exception was allowed, however, to the foregoing refusal to grant an exception, the record reciting in this respect (R. 57):

> *Eo die* an exception to the above refusal to grant an exception is hereby noted to the defendant, Daniel J. Shields.
>
> [SEAL.] F. P. SCHOONMAKER,
>
> *Judge.*

Shields thereupon took the case to the Circuit Court of Appeals upon writ of error, assigning among other alleged errors, the action of the District Court in sending the aforesaid communication to the jury and the refusal of the court to grant an exception to that action. (R. 67–71.) Overruling these contentions, the Circuit Court of Appeals, in an opinion affirming the judgment, said (R. 83):

> The justified reliance of Court on the request of counsel; avoidance of abortive mistrials and the timely administration of a court's work, based on the verdict of a jury which had evidence to support it, all unite in making the case one where with one breath a court cannot be asked by counsel to take a step in a case and later be convicted of error because it has complied with such request, for as is said in *17 Corpus Juris* 373–4, "A defendant in a criminal case cannot complain of error which he himself has invited."

As grounds for the allowance of a writ of certiorari, petitioner urges: (1) That the request joined in by counsel for the defendants, that the jury be held in deliberation until they had reached a verdict, could not properly be construed as a consent that the court might communicate with the jury out of court and in the absence of the defendants and their counsel; (2) that the action of the District Court in thus communicating with the jury was a denial to petitioner of due process of law; (3) that the judgment of the Circuit Court of Appeals upholding that action is in conflict with the decision of this Court in *Fillippon* v. *Albion Vein Slate Co.*, 250 U. S. 76; (4) that the instruction in said communication to the jury, that it "will have to find also whether Shields, Widman and Gastman are guilty or not guilty," was additionally erroneous because in violation of Section 1036 of the Revised Statutes, which authorizes a

jury to bring in a verdict as to those of the defendants regarding whom they are agreed, and declares that the case as to the other defendants may be tried by another jury; (5) that in this respect the instruction of the District Court runs counter to the decision of this Court in *Bucklin* v. *United States,* 159 U. S. 682; and (6) that the direction to the jury to bring in a verdict of guilty or not guilty as to the three defendants named had the effect of coercing the jury into rendering a verdict which they were plainly reluctant to return.

After a careful study of the record in this case the Government is unable to find any satisfactory ground for opposing the petition for a writ of certiorari. No brief in opposition will therefore be filed, and if the writ issues the Government will submit the case without being heard further.

Respectfully submitted.

WILLIAM D. MITCHELL,
Solicitor General.

MABEL WALKER WILLEBRANDT,
Assistant Attorney General.

JOHN J. BYRNE,
Attorney.

MARCH, 1926.

○

SUPREME COURT OF THE UNITED STATES.

No. 944.—October Term, 1926.

Daniel J. Shields, Petitioner, *vs.* The United States of America.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[April 11, 1927.]

Mr. Chief Justice Taft delivered the opinion of the Court.

The question here for review is the judgment of the Third Circuit Court of Appeals of February 14, 1927. A petition for certiorari was filed in this Court February 28, 1927, and is this day granted. For reasons to be explained, we proceed at once to consider the case on its merits.

Shields, the petitioner, was indicted and tried with eight or nine others for conspiracy to violate the Prohibition Act and also for direct violations of the Act. He was convicted of conspiracy and acquitted of the other charges. The case had been submitted to the jury February 12, 1926. Before the court convened the next morning, the jury still being out, counsel for the defendants and the Assistant United States Attorney in charge of the prosecution visited the trial judge in chambers and requested that the jury be held in deliberation until they should agree upon a verdict. Shortly after the opening of the court the jury returned for additional instructions on the subject of entrapment, and having received the same, retired for further deliberation. At 2.30 o'clock that afternoon the jury again returned to court, in the absence of petitioner and his counsel, and reported that they could not agree. What instructions, if any, were then given the jury the record does not disclose. It appears that the jury again retired to deliberate, and between 4.30 and 5.00 o'clock in the afternoon sent from their jury room to the judge in chambers the following written communication:

"We, the jury, find the defendants John G. Emmerling, Charles Lynch not guilty on all counts, E. W. Hardison, J. E. Hunter and J. L. Simler guilty on all counts. Daniel J. Shields, Harry Widman, J. M. Gastman unable to agree.

Signed, E. B. MILLIGAN,
Foreman."

The Judge from his chambers sent back the following written reply:

"The jury will have to find also whether Shields, Widman and Gastman are guilty or not guilty.

F. P. SCHOONMAKER,
Judge."

These communications were not made in open court, and neither the petitioner Shields nor his counsel was present, nor were they advised of them. Shortly after, the jury returned in court and announced the following verdict:

"We, the jury, find that the defendants John G. Emmerling, Charles Lynch, not guilty on all counts. E. W. Hardison, J. L. Simler, J. E. Hunter guilty on all four counts. Daniel J. Shields Harry Widman, J. M. Gastman guilty on first count and recommended to mercy of court. Not guilty on 2nd, 3rd and 4th counts, this 13th day of February, 1926.

E. B. MILLIGAN,
Foreman."

Upon this verdict the court rendered its judgment sentencing Shields to pay a fine of $2,000 and to be imprisoned in jail for one year. Shields then filed in court a petition alleging that not until April 21, 1926, more than two months later, did he or his counsel have any knowledge of the tentative verdict sent by the jury to the Judge in chambers, or of the reply thereto by the Judge, and praying that he be allowed an exception to the action of the Judge in sending the reply. The court refused to grant the petition, for the reason as stated by it,

"that counsel for the defendant, Daniel J. Shields, requested the court to hold the jury in deliberation until they should agree upon a verdict, and therefore when the court received the communication from the jury, it was returned with the instructions complained of, although it is true that the defendant's counsel was not present when the communication was handed to the court from the jury.

(Sgd) Per Curiam,
S."

An exception was allowed, however, to the foregoing refusal to grant an exception, the record reciting in this respect:

"*Eo die* an exception to the above refusal to grant an exception is hereby noted to the defendant, Daniel J. Shields.

F. P. SCHOONMAKER,
Judge."

Shields took the case to the Circuit Court of Appeals assigning among other errors the action of the District Court in sending the communication to the jury and the refusal of the court to grant an exception to that action. The Circuit Court of Appeals in affirming the judgment said:

"The justified reliance of Court on the request of counsel; avoidance of abortive mistrials and the timely administration of a court's work, based on the verdict of a jury which had evidence to support it, all unite in making the case one where with one breath a court can not be asked by counsel to take a step in a case and later be convicted of error, because it has complied with such request, for as is said in 17 Corpus Juris 373-4, 'A defendant in a criminal case can not complain of error which he himself has invited.'"

The petitioner urges first that the request joined in by counsel for the defendants, that the jury be held in deliberation until they had reached a verdict, could not be properly construed as a consent that the court might communicate with the jury out of court and in the absence of the defendants and their counsel; second, that the action of the District Court in thus communicating with the jury was a denial to petitioner of due process of law; third, that the judgment of the Circuit Court of Appeals upholding that action is in conflict with the decision of this Court in *Fillippon* v. *Albion Vein Slate Co.*, 250 U. S. 76; fourth, that the instruction in the communication to the jury that it 'will have to find also whether Shields, Widman and Gastman are guilty or not guilty', was additionally erroneous because in violation of Section 1036 of the Revised Statutes, which authorizes a jury to bring in a verdict as to those of the defendants regarding whom they are agreed, and declares that the case as to the other defendants may be tried by another jury; fifth, that in this respect the instruction of the District Court runs counter to the decision of this Court in *Bucklin* v. *United States*, 159 U. S. 682; and, sixth, that the direction to the jury to bring in a verdict of guilty or not guilty as to the three

defendants named had the effect of coercing the jury into rendering a verdict which they were plainly reluctant to return.

The Solicitor General advises us that after a careful study of the record in this case, the Government is unable to find any satisfactory ground for opposing the petition for a writ of certiorari, and that no brief in opposition will therefore be filed, and if the writ issues, the Government will submit the case without being heard further.

In view of this, we deem it proper to dispose of the case at once. On the statement of the case as we have given it, we think the judgment of the Circuit Court of Appeals must be reversed on the first and third grounds urged and the cause remanded to the District Court for a new trial. The joint request to the court of counsel for the defendant and the Assistant District Attorney to hold the jury in deliberation until they should agree upon a verdict, made in chambers without the presence of the defendant, cannot be extended beyond its exact terms. It did not include any agreement that the court should receive a communication from the jury and answer it without giving the defendant and his counsel an opportunity to be present in court to take such action as they might be advised, especially when the communication as to the result of the deliberations of the jury showed a marked difference in the views which the jury had as to the guilt of the various defendants. Counsel in making it, necessarily assumed, as they had a right to, that any communication from the jury would be made in open court, and that they must necessarily be offered an opportunity to withdraw the request already preferred or to vary it. It is hardly fair to say that a general request to hold the jury for a verdict can be properly applied to such a situation as subsequently developed by the communication of the jury showing their views as to the various defendants.

In the case of *Fillipon* v. *Albion Vein Slate Co.*, 250 U. S. 76, which was a suit for damages for personal injuries, it appeared that after the trial judge had completed his instructions and the jury had retired for deliberation, and while they were deliberating, it sent to the judge a written inquiry on the question of contributory negligence, to which the trial judge replied by sending a written instruction to the jury room in the absence of the parties and their counsel and without their consent and without calling the

jury in open court. A new trial was ordered on this account. The court said:

"Where a jury has retired to consider of its verdict, and supplementary instructions are required, either because asked for by the jury or for other reasons, they ought to be given either in the presence of counsel or after notice and an opportunity to be present; and written instructions ought not to be sent to the jury without notice to counsel and an opportunity to object."

If this be true in a civil case, *a fortiori* is it true in a criminal case. The request made jointly by the counsel for the defendant and for the Government to the court did not justify exception to the rule of orderly conduct of jury trial entitling the defendant especially in a criminal case to be present from the time the jury is impaneled until its discharge after rendering the verdict. We reverse the judgment without reference to the other causes of error assigned.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.